91-510

Supreme Court, U.S.
FILED
SEP 30 1991
OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PATSY O. TIFFANY
ADMINISTRATRIX AND PERSONAL REPRESENTATIVE
FOR THE ESTATE OF HENRY H. TIFFANY, DECEASED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

v.

BRANDON LADD CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

Does the United States military enjoy absolute immunity from suit for negligence against civilians in the course of peacetime missions that may involve "national security," but do not involve a discretionary function?

In considering the scope of the military's immunity for operational negligence, should the court of appeals have interpreted the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(a), in accord with the decisions of this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) and *Berkovitz v. United States*, 486 U.S. 531 (1988), and decisions of the Third, Eighth, and Ninth Circuits involving similar facts?

Do the congressional intent and the plain language of the Federal Tort Claims Act require that the military be accountable for the negligence of its employees in activities that do not involve actual combat, and do not involve a discretionary function?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Patsy O. Tiffany, administratrix and personal representative for the Estate of Henry H. Tiffany, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on April 30, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (App. A, *infra*, pp. A-1 to A-21) is reported at 931 F.2d 271 (4th Cir. 1991). It reversed the district court opinion reported

at 726 F. Supp. 129 (W.D. Va. 1989) (App. B, infra, pp. B-1 to B-15).

JURISDICTION

The judgment of United States Court of Appeals for the Fourth Circuit (App. C, *infra*, C-1) was entered on April 30, 1991. A petition for rehearing and suggestion for rehearing *en banc* was denied on July 3, 1991 (App. D, *infra*, D-1 to D-2). (Judge Murnaghan voted to rehear the case *en banc*.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

The Federal Tort Claims Act, 28 U.S.C. § 2680, provides in relevant part:

> The provisions of this chapter and section 1346(b) of this title [permitting suit against the United States for tort claims] shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> * * *
>
> (j) Any claim arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war* (emphasis added).

STATEMENT OF THE CASE

At 4:44 p.m. on January 3, 1983, a twin engine propeller plane piloted by Henry H. Tiffany was struck from behind by an F-4C Phantom interceptor and crashed on the high seas off the coast of North Carolina. Tiffany and six civilian passengers were killed. The interceptor returned to its base with wing damage.

The proximity of the two aircraft was not fortuitous. The interceptor was operated by members of the Michigan Air National Guard attached for weekend active duty to the Air Force's North Atlantic Air Defense Command (NORAD). It had been dispatched by NORAD to attempt a visual identification of the Tiffany aircraft because the radar track did not correlate with any flight plan on file.[1] Consistent with a peacetime mission against an aircraft that was unidentified, but could not be presumed hostile, the interceptor operated under Air Force regulations and established procedures that were intended to ensure that the identification mission would be completed safely. A summary of these procedures, was published for use by civilian pilots.[2]

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1. Tiffany had filed a flight plan with the flight service station in Nassau, Bahamas, before he departed. The flight plan called for him to proceed to Ft. Pierce, Florida, and then to Norfolk, Virginia, as required by a notice to airmen (NOTAM) that had been called to Tiffany's attention in Nassau. However, Tiffany did not activate the flight plan after he took off. Rather than fly to Ft. Pierce, Tiffany proceeded north towards Norfolk. Before he was informed that the interceptors had been dispatched, Tiffany initiated contact with Air Traffic Control to report his intentions and request that he be met by Customs.

The district court declined to find that Tiffany's failure to follow the plan had been deliberate and specifically held that the failure to follow the flight plan was not a proximate cause of the collision (B-2). It found the Government's claim that Tiffany was trying to evade detection untenable in light of Tiffany's request, when he contacted Air Traffic Control, that Customs officials be told of his expected arrival in Norfolk (B-3). The court of appeals did not discern error in these findings. But it did note "the tremendous practical importance as well as the legal necessity of filing accurate flight plans," and asserted, without support in the record, that Tiffany "had decided against complying with Customs regulations" (A-4). Presumably, the court of appeals' disagreement with the district court about fault on Tiffany's part did not influence its determination that the action against the Government was barred, irrespective of fault by the Government personnel.

2. Certain of the Air Force regulations concerning intercept procedures, including required vertical separation and closure speeds, are quoted in note 13, *infra*. A summary of these intercept procedures was published to civilian pilots in the Airmen's Information Manual ("A.I.M."), a Federal Aviation Administration publication that civilian pilots are required, by regulation, to be familiar with. *See* 14 C.F.R. § 61.105 (1982). A substantially identical summary is set forth in the Aeronautical

Petitioner, Henry Tiffany's widow and personal representative, sued the United States for wrongful death under the Suits in Admiralty Act, 46 U.S.C. §§ 741-52, in the United States District Court for the Western District of Virginia.[3] The Government denied liability and counterclaimed for indemnity to recover sums it had paid in settlement of claims by the estates of four of Tiffany's passengers, in addition to a claim for damage to the interceptor. The Government also commenced a third-party action for indemnity and damage to the aircraft against Brandon Ladd Corporation, the lessee of the Tiffany airplane.[4] Actions against the Government by the estates of the two remaining passengers were consolidated with the *Tiffany* action, but were later settled and dismissed.[5] The Government's counterclaim for indemnity was dismissed on a motion for summary judgment. The remaining claims proceeded to trial. Petitioner's claims were limited to assertions of operational negligence in the control and execution of the intercept by the pilots and ground control personnel. There was no assertion of fault in the Government's selection of equipment, the decision to conduct the identification mission or the choice of tactics that were employed. Nor did the Government adduce any evidence that

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Information Publication ("A.I.P."), which governs international flights. Pertinent excerpts from these publications are quoted in note 6, *infra*. The fact that the intercept tactics were published demonstrated the noncombatant nature of the identification procedure.

3. The right of action for wrongful death was conferred under the Death on the High Seas Act, 46 U.S.C. §§ 761-68.

4. Henry Tiffany was president of Brandon Ladd Corp., which operated the aircraft under a long term lease. It was stipulated that, at the time of the accident, Tiffany was using the aircraft for personal business. A separate action by Brandon Ladd Corp. to recover for loss of the aircraft, commenced in the United States District Court for the District of Columbia, was transferred to the Western District of Virginia and consolidated with the *Tiffany* action. *Brandon Ladd v. United States*, No. 85-0040-C (W.D. Va.).

5. *Williams v. United States*, No. 85-0004-C (W.D. Va.); *Whittaker v. United States*, Nos. 85-0048-C, 85-0052-C (W.D. Va.).

the Air Force pilots or ground control personnel ever believed, or even suspected, that the Tiffany aircraft was hostile.[6]

Following trial, the district court (Michael, J.), issued a memorandum opinion incorporating the court's findings of fact and conclusions of law. The district court found the Government solely liable for the collision. Among the elements of negligence it specified were the failure of the ground controllers to terminate the intercept when they had sufficient information to identify the Tiffany aircraft, failure of the controllers to give the interceptor pilot a proper altimeter setting, failure of the pilots to maintain proper vertical separation, failure of the interceptor to identify the position of the Tiffany aircraft properly on its radar, and failure of the interceptor to follow prescribed procedures for breaking off the intercept (B- 7-8). These findings of negligence were based not only on the requirements of the Air Force regulations, but also on admissions of the Air Force's own expert witness.[7]

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6. Although the court of appeals emphasized the bellicose nature of the interceptor's mission, characterizing it as "the actual military defense of our country" (A-11), involving a "potentially hostile aircraft" (A-16), the evidence before the district court raised no inference that the Air Force anticipated or suspected a combat situation to develop.

The A.I.M. and the A.I.P., which were published for civilian pilots, both stressed that peacetime identification intercepts were "vastly different than those conducted under increased states of readiness" and that the air crews "will constantly keep in mind that maneuvers considered normal of a fighter aircraft may be considered hazardous to passengers and crews of nonfighter aircraft." They both stated that peacetime identification of unknown aircraft would be "by type only" (*e.g.*, Boeing 737, Cessna 210), and assured civilian pilots that "positive vertical separation will be maintained by interceptor aircraft throughout [the identification] phase." They further guaranteed that: "When interceptor aircrews know or believe that an unsafe condition exists, the identification phase will be terminated." The complete relevant text of the A.I.M. is in Vol. 2 of the Court of Appeals Joint Appendix at 425-30 [hereinafter C.A.J.A.]. The comparable part of the A.I.P. is at 2 C.A.J.A. 509-20.

7. The government's expert on intercept procedures, Lt. Col. Smith, conceded that the interceptor pilots violated Air Force regulations that required the interceptors to maintain 1000 feet vertical separation and to limit the overtake speed to no more than 50 knots (B-8; 4 C.A.J.A. at 1218, 1232).

The Fourth Circuit Court of Appeals reversed. The court held that a finding of negligence against the Government "would be interjecting tort law into the realm of national security and second-guessing judgments with respect to potentially hostile aircraft that are properly left to the other constituent branches of government" (A-8). Although the court of appeals acknowledged that the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(a), was implied in the Suits in Admiralty Act, it declined to use the exception as the basis for its analysis of Mrs. Tiffany's claim. The court held that "While the doctrine of discretionary functions . . . informs our inquiry . . . the discretionary function exception alone does not capture all the important aspects of this case" (A-11). Instead, the court applied principles of "justiciability" and "separation of powers" to conclude that there were "no 'judicially discoverable and manageable standards for resolving' whether necessities of national defense outweigh risks to civilian aircraft" (A-14, quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

Specifically, the court of appeals rejected Petitioner's contention that NORAD and USAF regulations, manuals, and procedures provided a standard by which the Air Force's negligence could be measured. While observing that the regulations in question "actually reserve a great deal of discretion for the parties who must conduct the defensive maneuvers" (A-15), the court of appeals did not hold that the district court incorrectly applied the standards for the discretionary function exception set forth in *Berkovitz v. United States*, 486 U.S. 531 (1988) or other decisions of this Court. Instead, the court of appeals held that the existence of these operating procedures "cannot convert this dispute into a justiciable issue when so many other factors counsel against judicial intervention." *Id.*

REASONS FOR GRANTING THE WRIT

I

The Decision of the Court of Appeals Confuses the Standards Governing the Government's Liability for Negligence by Imposing a Complete Shield for Certain Acts of Military Negligence, Rather than a Limited Immunity for Acts that Require Discretionary Judgment

The decision of the court of appeals further clouds an area of law that is already foggy. At a time when this Court is trying to define the bounds of discretionary functions in order to clarify the rules that will govern suits against government contractors and government employees, the court of appeals has abandoned the discretionary function test altogether. Instead, it has extended the doctrine of nonjusticiability, based on separation of powers, into areas that have never been recognized by this or any other court. If allowed to stand, the decision will frustrate the efforts of this Court to bring order to the law governing suits involving the Government and the military.

A. The Decision Ignores Decisions of This Court that Restrict the Scope of the Separation of Powers Doctrine, Including *Boyle v. United Technologies Corp.*

The Fourth Circuit's analysis of the Government's immunity from suit for negligence as a matter of "separation of powers" departs radically from this Court's recent opinion in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), and far exceeds the limits of the doctrine of justiciability that have previously been sanctioned by this Court. Although the decision of the court of appeals involves a suit against the Government, rather than a government contractor, it seriously undermines this Court's decision in *Boyle* and cases that follow it.

In *Boyle*, this Court examined a decision in which the Fourth Circuit used a "separation of powers" approach to analyze a civilian's claim that a manufacturer negligently

designed military equipment. The Fourth Circuit followed the rationale of *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988), a companion case to *Boyle* which extended the "separation of powers" principles underlying *Feres v. United States*, 340 U.S. 135 (1950) and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977) to bar suits against government contractors.[8] Justice Scalia's opinion in *Boyle* affirmed the result reached by the Fourth Circuit, but it explicitly rejected the separation of powers doctrine as a foundation for analysis of torts involving civilians, holding that the *Feres* approach "logically produces results that are in some respects too broad and in some respects too narrow." 487 U.S. at 510. Specifically, Justice Scalia noted that the separation of powers approach adopted by the Fourth Circuit in *Boyle* "covers only service-related injuries and not injuries caused by the military to civilians." *Id.*

As an alternative to separation of powers analysis, the Court, in *Boyle*, held that the protection of the Federal Tort Claims Act for conduct arising out of a discretionary function or duty constituted a "federal policy" that applied to civilian contractors as well as to the military itself. 487 U.S. at 512. This "policy," in turn, was used by the Court to examine the criteria that would sustain government contractor immunity.

This Court's disapproval of the *Tozer* rationale did not deter the Fourth Circuit in its decision below from using *Tozer* as the starting point for a holding that shields the military from suit for negligence in any activity that somehow involves "national security," irrespective of whether the act is discretionary or not. The court begins its analysis by quoting *Tozer*, asserting that it would be "unseemly" for decisions "'providing for common survival and defense,'" to be made

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8. Judge Wilkinson's opinion in *Tozer* held that the grant of judicial immunity to government contractors "advances the separation of powers and safeguards the process of military procurement." 792 F.2d at 405. The decision did not cite *Feres* specifically, but relied on *Stencel*, which applied the *Feres* doctrine to indemnity claims by government contractors against the Government.

by courts, because courts are the "'least accountable branch of government'" (A-10, quoting *Tozer*, 792 F.2d at 405). Judge Wilkinson then quotes from *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), and *Baker v. Carr*, as he did in the *Tozer* decision (*see* 792 F.2d at 405), before concluding that "Any judgment we might render would lay upon NORAD a strata of tort law which would be both capricious and confining in its impact" (A-14).

In pursuing its separation of powers rationale the court of appeals not only ignored this Court's instructions in *Boyle*; it also ignored the limits of the separation of powers doctrine that were set by this Court in the cases that the court of appeals purported to follow. Thus, in *Gilligan*, this Court noted that:

> In concluding that no justiciable controversy is presented, it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel.

413 U.S. at 11-12.

In support of this holding, the Court then quoted its earlier opinion in *Laird v. Tatum*, 408 U.S. 1, 15-16 (1972):

> [W]hen presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

Consistent with these principles, this Court has sanctioned the doctrine of nonjusticiability as a defense to suits involving alleged wrongdoing by the military only in circumstances where military policy and planning is challenged. *See, e.g., Gilligan*, 413 U.S. at 4-5 (challenge to "a pattern of training, weaponry and orders" constituting "a broad call on judicial

power to assure continuing regulatory jurisdiction"); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (challenge to Selective Service Act provision for registration of men and not women); or in situations involving suits by servicemen, where considerations of military morale and discipline are involved, *e.g., United States v. Stanley*, 483 U.S. 669 (1987) (*Bivins* action by serviceman barred); *Chappell v. Wallace*, 462 U.S. 296 (1983) (discrimination claim by servicemen barred); *Feres v. United States*, 340 U.S. 135 (1950) (tort claim by serviceman barred).[9] In this respect, the doctrine of nonjusticiability has been applied by courts in a manner consistent with the judicial application of the discretionary function exception to the FTCA, which also bars suits that challenge federal policy.

The Fourth Circuit's decision here extends the doctrine of nonjusticiability far beyond its previous boundaries. Not only are challenges to policy decisions nonjusticiable; challenges based on common law negligence and violation of regulations are also nonjusticiable so long as they can be said to somehow involve considerations of "national security" or "national defense." The Court of Appeals for the Fourth Circuit has now spawned a whole new class of claims, contrary to the law in other circuits, for which injured victims will have no remedy.

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9. Similarly, federal circuit courts and district courts that have considered the doctrine of nonjusticiability as its applies to the military have applied the doctrine only in circumstances involving challenges to governmental policy decisions. *See, e.g., DaCosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973) (presidential directive to mine North Vietnamese ports and bomb North Vietnamese targets); *In re Korean Air Lines Disaster of September 1, 1983*, 597 F. Supp. 613 (D.D.C. 1984) (claim that military aircraft were negligently deployed); *Rappenecker v. United States*, 509 F. Supp. 1024 (N.D. Cal. 1980) (claims involving foreign policy determinations and the appropriateness of military tactics). By contrast, claims involving lack of due care in carrying out policy decisions have been held to be justiciable. *See, e.g., Volgelaar v. United States*, 665 F. Supp. 1295 (E.D. Mich. 1987) (claim for negligence in classifying decedent soldier as a deserter and mishandling his remains held to be justiciable); *Rappenecker v. United States*, 509 F. Supp. at 1030 (claim alleging Government's failure to warn of risks of vessel seizure held to be justiciable, although challenges to foreign policy determinations and use of tactics held not justiciable).

Moreover, the door is now open to potentially endless litigation to define the new scope of the separation of powers doctrine and the parties who may benefit from it. Rather than analyzing negligent action by either Government employees or government contractors solely in light of relatively settled principles underlying the discretionary function exception, courts must now resolve a plethora of new issues. What distinguishes the "national security" mission from the ordinary mission?[10] Is the government contractor whose equipment fails in the course of a "national security" mission entitled to the same protection that is afforded to the military personnel who conduct that mission? Does the "national security" exemption extend to civilian agencies, such as the FBI or the CIA? This Court should spare the federal courts this incipient controversy by limiting the scope of the doctrine of nonjusticiability to its previous confines.

B. The Decision of the Court of Appeals Departs from This Court's Decision in *Berkovitz v. United States* and Other Decisions of This Court that Construe the Limits of the Government's Exemption from Liability for Discretionary Functions Under the Federal Tort Claims Act

The mischief wrought by the court of appeals is compounded by the court's assertion that an analysis in light of discretionary function would reach the same result. The court of appeals declares that the controversy "implicates a discretionary decision of the most serious sort" (A-11), and it takes issue with certain of the district court's findings in light of selective NORAD regulations that the court of appeals believes "preserve significant discretion for the necessary actors" (A- 18-20). But the underpinning of the decision is not that the pilots' conduct of the intercept was a discretionary

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10. The court below did not proffer any guidelines to distinguish nonjusticiable military functions from justiciable ones. However, it distinguished cases in other circuits that sustained actions against the Air Force for negligent operation of aircraft as ones involving "training exercises" or "acting in the civilian area" (A-16). These issues were never raised in the district court.

matter, but rather that it would be "unseemly" for the court to intrude into matters that "are properly left to the other constituent branches of government" (A-10, A-8). The court therefore refrains from examining the key elements of the Government's negligence—the negligence of the controllers and the interceptor pilots in the operation of their aircraft. This negligence included the admitted violation of regulations whose purpose was to ensure the safety of the identification effort.[11]

The resulting analysis calls into question two basic maxims for the construction of the FTCA and, by implication, the Suits in Admiralty Act: First, that the primary purpose of the FTCA was to make the Government liable for the common law torts of its employees, *Dalehite v. United States*, 346 U.S. 15, 25-26, n. 9 (1953); Second, that the Government will not be shielded from liability for its employees' failure to obey "a federal statute, regulation, or policy" that "specifically prescribes a course of action for an employee to follow," *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). [12] These precepts, in turn, have led this Court to conclude that

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11. *See supra*, note 6 and *infra*, note 13. The court below did not consider the regulations to be important, characterizing them as "internal operating procedures" A-15.

12. The court below attempted to distinguish *Berkovitz* on the grounds that it involved regulations that were published in the Code of Federal Regulations, whereas the NORAD regulations were merely "internal operating procedures" (A-15). This distinction is spurious in light of well-established precedent that internal regulations may create a standard to measure the negligence of Government employees, particularly in the case of air traffic controllers. *E.g., Rodriquez v. United States*, 823 F.2d 735, 741 (3rd Cir. 1987); *Daley v. United States*, 792 F.2d 1081, 1085 (11th Cir. 1986); *cf., Downs v. United States*, 792 F.2d 990, 997 (6th Cir. 1975) (FBI handbook provided standards for measuring negligence of agent in hijacking situation). In any case, the Government can be held liable for its employees' lack of ordinary prudence under common-law principles. *See, e.g., Rayonier, Inc. v. United States*, 352 U.S. 315 (1957) (negligent fire fighting); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) (negligent maintenance of a lighthouse); *Brooks v. United States*, 337 U.S. 49 (1949) (negligence by driver of Army truck). These principles would apply to piloting an aircraft, which is nothing more than the airborne counterpart of driving a vehicle.

particular Government activities are not excluded from judicial review solely on account of the subject matter or the office of the employees involved. It is the "nature of the conduct rather than the status of the actor" that controls. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984). These principles are still vibrant. This Court recently reaffirmed them in *United States v. Gaubert*, ____ U.S. ____, 111 S. Ct. 1267, 1273-74 (1991), where the Court held that the focus of any inquiry was whether actions were susceptible to "policy analysis." *Id.* at 1275.

The court of appeals ignored these precepts. It explicitly declined to review the procedural and regulatory violations underlying the district court's findings of negligence because it concluded that "other powerful factors foreclose judicial entertainment of Tiffany's assertions" (A-15). Moreover, in direct contravention of this Court's holdings in *Gaubert* and *Berkovitz*, the court held that it "cannot accept Tiffany's assumption that NORAD regulations automatically create an actionable duty in tort towards civilians," (A-16), because "to base tort liability in this situation on a failure to follow internal regulations would have few positive outcomes" (A-18). [13]

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13. Although the court below expressed an opinion that "many of the regulations ... actually preserve significant discretion for the necessary actors" (A-18), and discussed certain regulations, it did not examine many of the key regulations and acts that were the foundation of the district court's finding of negligence. Contrary to the implication of the court of appeals, the critical regulations before the trial court did not leave room for discretion. For example, the Air Force manual on intercept procedures, USAF Manual 55-200, § 4-5 (a) prescribes that: "After 'JUDY' [the call by which the interceptor assumes control of the intercept from the ground controllers] aircrews will maintain a minimum of 1,000 feet vertical separation from the target: (1) Day [light]—Until visual contract is established." 2 C.A.J.A. 625. The manual on Visual Identification of Intercepts, USAF IWIM 51-4, states that: "once in the stern, VC [closure speed] should be held at ... 50KTS [knots] at ranges less than 1 NM." 10 C.A.J.A. 3440.

As we have seen, the summary of the intercept procedures published to civilian pilots in the A.I.M. and the A.I.P. stated that vertical separation would be maintained at all times and that the mission would be terminated

By asserting that its decision is consistent with the principles of the discretionary function exception, without analyzing the underlying regulations or acts of negligence in light of that exception, the court of appeals further confuses an already confused area of law. Courts seeking to follow the court of appeals' decision may interpret it to hold that the Government discretionary function exception exempts the Government from liability for the common law torts of its employees or their violation of mandatory regulations, in contravention of *Dalehite*, *Berkovitz*, and *Gaubert*, if it can be claimed that national security is involved. Alternatively, courts may interpret it to mean that the discretionary function exception does not apply to the military at all, in contravention of *Varig*. In one stroke, the Fourth Circuit has abandoned the standards for Government liability that have been refined in nearly fifty years of decisions by this Court and has substituted a new test whose boundaries are completely uncharted and at odds with other circuits. Certiorari should be granted to correct this dangerous precedent before the guidelines set by this Court become shrouded in a fog of new exceptions.

II

The Decision of the Court of Appeals Is in Conflict with Decisions of Three Other Circuits

The opinion of the court of appeals not only ignores the guidelines of this Court; it stands in opposition to a long-established body of law in other circuits that has held pilots and other military personnel accountable for operational negligence in the course of their duties. If the opinion of the court of appeals is allowed to stand, these disparate interpretations of the FTCA will frustrate the uniform interpretation of the statute and other statutes, such as the Suits in Admiralty Act, that adopt the FTCA's principles.

In holding that the Government may not be sued for operational negligence involving national security, the Fourth Circuit has set itself in opposition to at least three other circuits

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if the interceptor crew knew or believed that an unsafe condition existed. *See* note 6, *supra*.

that have considered similar situations. In *Peterson v. United States*, 673 F.2d 237 (8th Cir. 1982) the Government was held responsible for damage resulting from excessive noise of an aircraft that was off course. The court held that the planning of the military mission was a discretionary function but that the discretionary function exception "does not protect the United States from liability for operational negligence in carrying out such a mission." *Id.* at 240. In *Ward v. United States*, 471 F.2d 667, 670 (3rd Cir. 1973) the Third Circuit reached a similar conclusion, observing that "The same distinction is applicable to the operation of aircraft" as applies between ordering army maneuvers and operating army vehicles during the maneuvers. In *United Air Lines, Inc. v. Wiener*, 335 F. 2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964) the Ninth Circuit held that the Government could be held liable for a mid-air collision between a military jet and a civilian aircraft even though part of the alleged negligence involved the planning of the military maneuvers. The court held that the applicable Air Force regulations "imposed a clear duty upon Nellis Command to design flying procedures in light of facts obtainable from a study of commercial passenger air traffic in the area." *Id.* at 394.

Although the court of appeals tried to distinguish some of these precedents on the grounds that they involved training exercises (A-16) these precedents do not draw this distinction. Nor, in other situations where national security was arguably imperiled, have any other courts or the Government itself seen fit to draw such a distinction. Thus, in *Downs v. United States*, 522 F.2d 990 (6th Cir. 1975), the Sixth Circuit held the Government liable for negligence of FBI agents in mishandling a hijacking. The court invoked traditional discretionary function principles, finding that the agents "were not involved in formulating governmental policy," but rather "the chief agent was engaged in directing the actions of other Government agents in the handling of a particular situation." *Id.* at 997. Moreover, in circumstances closely analogous to those at bar, involving the evacuation of orphans, military and civilian personnel from Saigon in emergency circumstances,

shortly before the city's fall, the Government conceded liability for negligence that resulted in the crash of an Air Force cargo plane. *See, Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 840 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 994 (1982).

The existence of a body of settled law in conflict with the decision of the court of appeals increases the likelihood that the decision will create confusion. One of the important functions of this Court is to resolve such conflicts. *See*, S. Ct. R. 10.1(a).

III

The Decision of the Court of Appeals Creates an Exception to the Federal Tort Claims Act for Activities Involving National Security that Is Contrary to the Congressional Intent and the Plain Language of the Statute

Although this action was not brought under the Federal Tort Claims Act, as we have seen, the scope of the discretionary function exception is common to both the FTCA and the Suits in Admiralty Act.[14] The decision of the court of appeals endorses an interpretation of the discretionary function exception of the FTCA that is inconsistent with the remainder of the act. It would render the FTCA's exception for "combatant activities . . . during time of war," meaningless.

The discretionary function exception is only one of thirteen specific categories of claims that are excepted from coverage under the FTCA. As we have seen above, the drafters of the FTCA viewed the discretionary function exception as one that addressed issues of "policy judgment and decision." *Dalehite*, 346 U.S. at 36. A separate exception defined the limited circumstances in which operational negligence by military employees would be protected. The exception provides that

14. The court below correctly noted that "Each circuit that has considered the matter has concluded that actions brought under the SAA which would require the court to re-examine discretionary acts taken by the government must be dismissed" (A-10). It cited cases from eight circuits and two district court decisions.

the act shall not apply to "Any claim arising out of the combatant activities of the military or naval forces . . . during time of war." 28 U.S.C. § 2680(j).

The combatant activities exception to the FTCA is similar to the newly enunciated "national security" exception proffered by the court of appeals. Both exceptions are absolute and confer complete immunity on the Government for negligence by military personnel engaged in specified kinds of activities. Neither exception requires the court to consider the nature of the allegedly negligent act, the level at which the negligence occurred, or the policy implications of the negligence. Thus, the effect of both exceptions is identical. Since combatant activities in time of war will always invoke national defense considerations, the effect of the panel's opinion is to make the combatant activities exception to the FTCA redundant.

Nothing in the plain language of the FTCA or in the construction of the act in the courts suggests that 28 U.S.C. § 2680(j) was meant to be surplusage, duplicating protections for military combatants that were already established under separation of powers principles. On the contrary, courts have uniformly held that the military's immunity from suit in quasi-combat situations is narrowly limited. *See, e.g., In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1255 (E.D.N.Y.) (Weinstein, J.), *app. dismissed*, 745 F.2d 161 (2d Cir. 1984) ("the term 'combatant activities' should be interpreted very narrowly"); *Skeels v. United States*, 72 F. Supp. 372, 374 (W.D. La. 1947) ("combatant activities . . . means engaging in the exercise of physical force").

Consistent with this narrow interpretation of the combatant activities exception, courts have refused to apply the exception in circumstances where military personnel were not involved in a direct encounter with a hostile enemy. *See, e.g., Johnson v. United States*, 170 F.2d 767 (9th Cir. 1943) (negligent discharge of oil by vessel returning from convoy not excepted); *Kuhne v. United States*, 267 F. Supp. 649 (E.D. Tenn. 1967) (claim for death of civilian electrical engineer employed at Oak

Ridge in connection with production of atomic bomb not barred); *Moran Towing & Transp. Co. v. United States*, 80 F. Supp. 623, 631, (S.D.N.Y. 1948) (naval vessel "at sea in time of war, engaged on a military mission" was not engaged in combatant activity because "the phrase was used to denote actual conflict, such as where the planes and other instrumentalities were being used . . . in bombing enemy-occupied territory, forces or vessels, attacking or defending against enemy forces, etc.").

As this Court noted in *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957), "There is no justification for this Court to read exemptions into the [FTCA] beyond those provided by Congress." The court of appeals has created a new exemption for activities involving "national security" that broadens the military's immunity from suit for negligence far beyond the scope contemplated in the plain language of the statute or any previous authority. The decision is an invitation or mandate for lower courts to ignore the plain language of the FTCA and other statutes and to impose the views of judges over the will of elected representatives. Congressional intent should not be so lightly thwarted. This Court should grant certiorari to review this opinion.

CONCLUSION

Certiorari should be granted to address the conflict between the decision of the court of appeals and those of this Court and other circuits, and to address an important question of federal law concerning the Government's liability to civilians for operational negligence by servicemen.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-3014

PATSY O. TIFFANY, Administratrix and Personal Representative of the Estate of Henry H. Tiffany, Deceased,
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
Defendant & Third Party Plaintiff-Appellant,

versus

BRANDON LADD CORPORATION,
Third Party Defendant-Appellee.

No. 90-3022

PATSY O. TIFFANY, Administratrix and Personal Representative of the Estate of Henry H. Tiffany, Deceased,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant & Third Party Plaintiff-Appellee,

versus

BRANDON LADD CORPORATION,
Third Party Defendant-Appellee.

Appeals from the United States District Court for the Western District of Virginia, at Charlottesville. James H. Michael, Jr., District Judge. (CA-84-100-C)

Argued: January 7, 1991 Decided: April 30, 1991

Before WILKINSON and WILKINS, Circuit Judges, and ELLIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge Wilkinson wrote the opinion, in which Judge Wilkins and Judge Ellis joined.

ARGUED: Thomas Barton Almy, Senior Aviation Counsel, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Wilton Jeremain Smith, GILMAN, OLSON & PANGIA, Washington, D.C., for Appellees. ON BRIEF: Stuart M. Gerson, Assistant Attorney General, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; John P. Alderman, United States Attorney, E. Montgomery Tucker, Assistant United States Attorney, Roanoke, Virginia, for Appellant. Michael J. Pangia, GILMAN, OLSON & PANGIA, Washington, D.C.; Frank Anthony Mika, Waynesboro, Virginia, for Appellee Tiffany; John J. Tigert, VI, Kathryn A. Ledig, TAFT, STETTINIUS & HOLLISTER, Washington, D.C., for Appellee Brandon Ladd Corporation.

WILKINSON, Circuit Judge:

Henry Tiffany and six passengers were killed following a midair collision between their Beech Baron airplane and a United States F-4C fighter jet. Tiffany had failed to activate a flight plan and thus had entered an air defense zone off the eastern coast of the United States as an unidentified and potentially hostile aircraft. Military authorities had dispatched two fighter jets to identify visually the unknown plane. The collision occurred in poor weather conditions seconds after one of the jets instituted a sharp left bank to avoid Tiffany's Baron. Tiffany's widow brought suit against the United States under the Death on the High Seas Act, 46 U.S.C. §§ 761-68, alleging that the military pilot and ground control had been negligent in their conduct of the intercept. The district court returned a verdict in favor of Tiffany. Because to entertain the allegations of negligence in this case would lead us to violate separation of powers principles which inform the discretionary function exceptions to the Federal Tort Claims Act and the Suits in Admiralty Act, we reverse the judgment.

I.

Henry Tiffany, a licensed civilian pilot, planned to fly his small Beech Baron airplane with six passengers from Nassau, Bahamas to Norfolk, Virginia on January 3, 1983. Although Tiffany was aware that the United States Customs Service

required him to pass through Customs in Florida, *see* 19 C.F.R. § 6.14 (1983) (in 47 Fed. Reg. 12,621-22 (1982)), he nevertheless attempted to file with the Bahamian Flight Service Station a flight plan for direct travel to Wilmington, North Carolina instead. The Bahamian authorities refused to accept Tiffany's initial flight plan and persuaded Tiffany to modify the plan to include a stop at Fort Pierce, Florida in order to satisfy the Customs requirement.

Filed flight plans are vital for all planes traveling into United States air zones. This is true not only because of Customs regulations but because of our system of national defense as well. Extending hundreds of miles into the Atlantic Ocean from the eastern coast of the United States is an Air Defense Identification Zone (ADIZ) established by the North American Air Defense Command (NORAD), an agent of the Department of Defense. NORAD is a joint military command composed of American and Canadian forces which have responsibility for maintaining the aerial defense of the North American continent. Its peacetime mission is "to detect and identify any unusual air activity within the perimeter areas of the North American Continent which might be prejudicial to the national interests, or indicate an imminent air attack against vital targets in the United States and Canada, and to restrict violations of sovereign airspace." NORAD Regulation 55-14 ¶ 2.a (May 5, 1980). To achieve these goals, NORAD must identify "[a]ll airborne objects detected entering or operating within an identification zone." *Id.* ¶ 5.a.

Both to facilitate that task and to protect civilian aircraft, Federal Aviation Regulations require all aircraft intending to penetrate an ADIZ to first file a flight plan. 14 C.F.R. § 99.11 (1983). If NORAD radar shows an aircraft in the ADIZ and that aircraft correlates with a filed flight plan, then NORAD can classify the plane as "friendly" and take no further steps towards verifying its identity. If the observed aircraft does not correlate with a filed flight plan, then NORAD must investigate further. This process is often accomplished by launching armed fighter planes to observe and visually identify the unknown aircraft. Relevant information may also be collected from a number of sources, including Customs

officials, adjacent air defense control facilities, other aircraft in the vicinity of the unknown, and civilian Air Traffic Control facilities, which may possess late flight plan or radar information.

NORAD has two minutes from the time it first detects an aircraft in an ADIZ to classify it as "friendly." NORAD Regulation 55-14 ¶ 5.c. After that time it must classify the aircraft as "unknown" and "continuously pursue[ ]" all methods of identification. *Id.* ¶ 6.b.3. No classification is ever permanent; even a plane initially recognized as "friendly" can be reclassified if its creates "suspicion as to its intent by reason of course, speed, altitude, radio/telephone procedures, maneuvers, flight size . . . or other abnormality." *Id.* ¶¶ 5.c.1, 6.b.2. In 1982, the year before Tiffany's crash, the 20th NORAD Region, operating out of Fort Lee Air Force Station near Petersburg, Virginia, encountered two hundred thirty-eight "unknown" planes. Interceptor aircraft were launched in one hundred ninety-two instances and visually identified sixty-six planes. The remainder were reclassified "friendly" on the basis of information received from other military or civilian facilities. Also in 1982, the 20th NORAD Region intercepted ten Soviet bloc aircraft operating off the east coast between Florida and Virginia.

Despite the tremendous practical importance as well as the legal necessity of filing accurate flight plans, Tiffany left Nassau slightly before 2:00 p.m. on January 3 without ever activating his modified flight plan. Flight plans that have been filed but not activated within one hour of takeoff are considered void. Thus, Tiffany was flying without an official flight plan and without any verified destination. Apparently he had decided against complying with Customs regulations and instead chosen to follow his original plan to fly directly north from Nassau. In addition, although other federal regulations required that he contact FAA traffic controllers in the United States before entering an ADIZ, 14 C.F.R. § 99.21 (1983), Tiffany failed to establish radio contact with any FAA Air Traffic Control facility until 4:31 p.m., when he was well within the ADIZ—by his estimate a mere fifty miles off the North Carolina coast.

A few minutes after 4:00 p.m., the 20th NORAD Region's radar system in Fort Lee, Virginia (FERTILE) detected an aircraft within the ADIZ that was heading north towards the North Carolina coast. The plane did not correlate with any filed flight plan and NORAD consequently classified it as "unknown." Two F-4 fighter planes were launched from an Air Force base in North Carolina to determine visually the type of the unidentified aircraft. The military planes reported "popeye" conditions at altitudes below thirteen to fourteen thousand feet, meaning that visibility was extremely restricted because of clouds. One of the F-4's attempted to make a visual identification pass of the unknown plane but its angle of approach was too steep and the pass was canceled.

Meanwhile, Tiffany had established radio contact at 4:31 p.m. with Federal Aviation Administration (FAA) air traffic controllers in Leesburg, Virginia. Although his Baron did not yet appear on the FAA radar system, Tiffany informed the controllers that he was approximately fifty miles south of New Bern, North Carolina and flying at an altitude of 9500 feet. At 4:37 p.m., however, he corrected his position and indicated he was actually fifty-six miles from Wilmington, North Carolina, a city located seventy-five miles southwest of New Bern. He also gave the air traffic controllers the make and model of his aircraft, information that NORAD would require before changing the plane's status to "friendly" based on FAA communications.

Both the FAA and Tiffany, as civilian entities, operated on VHF radio frequencies, while the military operated on UHF frequencies. Thus, although Tiffany could communicate with the FAA, and the F-4's could communicate with NORAD ground control (FERTILE), the Baron and the military aircraft could not contact each other. Exchanges between the military and civilian systems could occur only through separate ground circuits. Information that Tiffany relayed to FAA controllers thus had to pass through numerous hands to reach decision makers at FERTILE, a process which incorporated some delay. FERTILE control was in contact with the FAA throughout the intercept process.

At 4:41 p.m., a few minutes after Tiffany had given civilian authorities his corrected position, one of the F-4's, with call sign "JL-26," established contact with Tiffany's Baron by on-board radar. Seconds later, that plane "called a Judy," or indicated that it was taking control of the intercept and would complete the identification through use of its on-board radar. What happened next is not entirely clear. At 4:42:20, the FAA sent a message to FERTILE which indicated that it had positively identified Tiffany by radar and that the Baron was six to seven miles ahead of the fighter planes. Although FERTILE received at least part of this transmission, an official transcript showed that some of the message had not been received. Nevertheless, at 4:43:42, the status of the unknown track was changed to "friendly" in FERTILE's computer system, and at 4:44:21, the FERTILE control officer decided to terminate the intercept. That decision was relayed to plane JL-26 at 4:44:42, a few seconds before the collision.

During this period, JL-26 had been approaching Tiffany from behind; the fighter was below the Baron and to its left, according to both the ground radar reconstruction and the pilot's testimony based on his on-board radar. Ground control had instructed the F-4 to maintain at least a five hundred foot separation from the unknown. As JL-26 drew nearer, its radar screen displayed a "Break X," meaning that the plane had approached so close to the target that it could not fire its missiles. A Break X occurs at a distance of approximately one-half nautical mile. The F-4 then initiated a sharp left bank to break off the intercept.

While JL-26 was rapidly gaining ground, FAA controllers informed Tiffany that two F-4's were behind him. They also requested that Tiffany head towards New Bern, North Carolina instead of towards Norfolk. That direction would have required that Tiffany make a left turn. The FAA transcript shows that around 4:44 p.m., Tiffany responded, "we're fading to the right ah we've deviated . . . yea we can go direct New Bern now." Within seconds, the F-4's left wing collided with the Baron. The smaller plane fell into the Atlantic and no survivors were located. Although damaged, the F-4 was able to return to its home base.

The accident proved a difficult one to reconstruct. A radar reconstruction report by the National Transportation Safety Board (NTSB) confirmed that the F-4 had been steadily gaining altitude and then initiated a sharp left turn (roll angle of greater than twenty degrees) at least eight seconds before it collided with Tiffany's Baron. A second report by the NTSB analyzed the damage to the F-4's left wing and the relative air speeds of the two airplanes. That collision report indicated that the F-4 had been *descending* relative to the Baron, and that the difference in roll (or turn) angle between the two planes had been only 3.6 degrees. The NTSB harmonized the two reports by concluding that the Baron had also initiated a left turn. If the Baron had not changed altitude but had begun a left turn, the ascending F-4 could have impacted the smaller plane and the difference in turning angles would have appeared as if the F-4 had been descending on the Baron. The radar reconstruction did not indicate that Tiffany had initiated a left turn, however. Possible explanations of that discrepancy include a masking effect due to the larger F-4, a gap in the radar coverage due to the time between radar antenna revolutions, and an error in the collision report because Tiffany did not actually turn left.

Tiffany's wife, as the representative of his estate, brought suit in the United States District Court for the Western District of Virginia against the United States under the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-68, claiming that the United States negligently caused Tiffany's death. Brandon Ladd Corporation, which leased the Beech Baron to Tiffany, sought damages from the United States to compensate for the loss of the plane. The United States brought a counterclaim against Tiffany's estate for damage to the F-4 jet and sought contribution from Brandon Ladd as a third-party defendant. The survivors of the six passengers initiated suits against both Tiffany and the United States which were settled.

A bench trial was conducted. The district court found that the government was negligent because it failed to terminate the intercept when it had sufficient information to do so, because ground control failed to tell the pilot of JL-26 to correct a 180 foot error in its altimeter, and because the pilot "continued a

mission designed for a visual identification in weather effectively precluding such an identification, misidentified the position of the Baron aircraft relative to its position, turned left and ascended when the procedures called for a descent and a right turn, and failed to maintain the proper amount of vertical separation." The court found the United States liable to Tiffany's estate for $1,394,342 in lost income from Tiffany's law practice, and liable to Brandon Ladd for $45,000 for the loss of Baron.

The United States appeals.

II.

The negligence alleged in this case necessarily calls into question the government's most important procedures and plans for the defense of the country. Because providing for the national security is both a duty and a power explicitly reserved by the Constitution to the executive and legislative branches of government, the judiciary must proceed in this case with circumspection. If we were to hold that the United States acted negligently in conducting the defense of its eastern border, we would be interjecting tort law into the realm of national security and second-guessing judgments with respect to potentially hostile aircraft that are properly left to the other constituent branches of government.

A.

We first proceed to address the relation between separation of powers principles and the relevant federal statutes. Section 2 of the Suits in Admiralty Act (SAA), codified as amended at 46 U.S.C. §§ 741-52, allows suits against the United States if the plaintiff would have been able to bring an admiralty claim against a private party which acted as the government did. 46 U.S.C. § 742. Because the Death on the High Seas Act (DOHSA) provides Tiffany a cause of action in admiralty, *see* 46 U.S.C. § 761, the SAA allows the suit to proceed without a sovereign immunity bar. *See Williams v. United States*, 711 F.2d 893, 895 (9th Cir. 1983).

That a federal statute enables the courts to assert jurisdiction only begins the analysis, however. Constitutional demands

must still be satisfied. Separation of powers is "a doctrine to which the courts must adhere even in the absence of an explicit statutory command." *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1086 (D.C. Cir. 1980). That doctrine requires that we examine the relationship between the judiciary and the coordinate branches of the federal government cognizant of the limits upon judicial power. The Supreme Court, in *Baker v. Carr*, 369 U.S. 186, 217 (1962), identified a number of factors, any one of which may carry a controversy beyond justiciable bounds:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Thus, if resolution of the issues presented by Tiffany requires us to move outside the customary areas of judicial competence or if other "prudential considerations counsel against judicial intervention," *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring), then we must conclude that the controversy is nonjusticiable.

In tort cases brought against the government, these constitutional concerns are addressed through recognition of a "discretionary function" exception to government liability. The Federal Tort Claims Act (FTCA), which governs accidents occurring within the borders of the United States, did not waive sovereign immunity to claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The

Supreme Court has further recognized Congress' belief that "claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 810 (1984). It is plain that the discretionary function exception to tort liability serves separation of powers principles by "prevent[ing] judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 814. Were it otherwise, the cumulative force of liability "would seriously handicap efficient government operations." *United States v. Muniz*, 374 U.S. 150, 163 (1963).

The respect for separation of powers principles addressed through the discretionary function exception of the FTCA has been carried over into suits brought under DOHSA and SAA. Our recognition of the constitutional constraints on actions brought under those acts is not a novel phenomenon. We held in *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986), that a negligence action pursuant to DOHSA and SAA could not be maintained against a government military contractor because of separation of powers concerns. There we noted that it would have been unseemly for "a democracy's most serious decisions, those providing for common survival and defense, [to] be made by its least accountable branch of government." *Id.* at 405. Earlier, in *Faust v. South Carolina State Highway Dept.*, 721 F.2d 934 (4th Cir. 1983), this court refused to review a negligence claim in admiralty that challenged the Corps of Engineers' discretionary issuance of a permit.* Each circuit that has considered the matter has concluded that actions brought under the SAA which would require the court to re-examine discretionary acts taken by the government

* In noting that "[i]t has authoritatively been held that the exercise of the function to issue permits is an unreviewable discretionary function," the court in *Faust* necessarily narrowed *Lane v. United States*, 529 F.2d 175 (4th Cir. 1975), and recognized the existence of a discretionary function exception to the Suits in Admiralty Act in some circumstances. 721 F.2d at 939. We think for the reasons stated herein that this is one of those circumstances.

must be dismissed. *See Gercey v. United States*, 540 F.2d 536, 539 (1st Cir. 1976); *In re Joint E. and S. Dists. Asbestos Litigation*, 891 F.2d 31, 35 (2d Cir. 1989) [hereinafter *Asbestos*]; *Sea-Land Serv., Inc. v. United States*, 919 F.2d 888, 891 (3d Cir. 1990); *Wiggins v. United States*, 799 F.2d 962, 966 (5th Cir. 1986); *Gemp v. United States*, 684 F.2d 404, 408 (6th Cir. 1982); *Bearce v. United States*, 614 F.2d 556, 560 (7th Cir. 1980); *United States Fire Ins. Co. v. United States*, 806 F.2d 1529, 1535 (11th Cir. 1986); *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1086 (D.C. Cir. 1980); *see also Complaint of Valley Towing Serv.*, 609 F. Supp. 298, 301 (E.D. Mo. 1985); *Olympia Sauna Compania Naviera, S.A. v. United States*, 670 F. Supp. 1498, 1504 (D. Or. 1987), *aff'd without opinion*, 1989 Am. Maritime Cases 1216 (9th Cir. 1988). "Were there no such immunity for basic policy making decisions, all administrative and legislative decisions concerning the public interest ... would be subject to independent judicial review in the not unlikely event that the implementation of those policy judgments were to cause private injuries." *Gercey*, 540 F.2d at 539. We agree that assumption of such powers would be "intolerable under our constitutional system of separation of powers." *Asbestos*, 891 F.2d at 35.

While the doctrine of discretionary functions recognized under the FTCA and DOHSA thus informs our inquiry into the disposition of the present controversy, the discretionary function exception alone does not capture all the important aspects of this case. For "[j]usticiability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures...." *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (Frankfurter, J.) (cited in *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

B.

The present controversy implicates a discretionary decision of the most serious sort. It involves a civilian injury that followed from actions taken in actual military defense of our country. Of the legion of governmental endeavors, perhaps

the most clearly marked for judicial deference are provisions for national security and defense. *See Rostker v. Goldberg*, 453 U.S. 57, 64-67 (1981). The decisions whether and under what circumstances to employ military force are constitutionally reserved for the executive and legislative branches. *See, e.g.*, U.S. Const. art. II, § 2; art. I, § 8. With regard to decisions to employ military troops, "it is not the function of the Judiciary to entertain private litigation ... which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region." *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950). "Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Chappell v. Wallace*, 462 U.S. 296, 301 (1983) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)).

The strategy and tactics employed on the battlefield are clearly not subject to judicial review. *See, e.g., DaCosta v. Laird*, 471 F.2d 1146, 1155-56 (2d Cir. 1973) (challenge to presidential directive to mine Vietnamese harbors and continue air and naval strikes presents a nonjusticiable political question). "[T]he same considerations which preclude judicial examination of the decision to act must necessarily bar examination of the manner in which that decision was executed by the President's subordinates." *Rappenecker v. United States*, 509 F. Supp. 1024, 1030 (N.D. Cal. 1980). Not only do courts lack the expertise to evaluate military tactics, but they will often be without knowledge of the facts or standards upon which military decisions have been based. *Id.* at 1029 (alleged negligence in military action to free a captured vessel was nonjusticiable).

It matters not that the military decision here involves the defense of national borders rather than the projection of force abroad. The elementary canons of judicial caution are not limited to actions taken during actual wartime, but may extend to many other aspects of military operations. In declining to rule on the allegation that the training, weaponry

and orders of a state National Guard program made inevitable the unnecessary use of fatal force, the Supreme Court declared:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.

Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

So too does this case beckon courts into "complex, subtle, and professional [military] decisions," involving here the identification and interception of potentially hostile aircraft in our air zones. The Court declined to be drawn into such discretionary military decisions in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), where a Marine helicopter pilot's estate sued the government for an allegedly defective aircraft design. It recognized that selection of an appropriate design for military equipment was a function reserved for the armed forces because such decisions involved "not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." *Id.* at 511. To have permitted state tort law to enter and alter the equation would have been to allow judicial reappraisal of judgments that is constitutionally forbidden. *Id.; see Varig Airlines*, 467 U.S. at 814.

We likewise hold that Tiffany cannot reshape the national response to threats of hostile air attack through the mechanism of tort law. Because Tiffany failed to comply with federal regulations, NORAD confronted an unidentified aircraft which had entered an air defense zone initially undetected, and which was heading directly for the continental United States.

The potential danger to American lives that such a scenario presents is apparent. NORAD was forced to initiate protective measures.

The executive and legislative branches have accorded NORAD the authority and the substantial responsibility of protecting the nation's borders. Thus, NORAD is the party that must balance the "many technical, military, and even social considerations" when developing a system of identifying unknown aircraft. *Boyle*, 487 U.S. at 511. It must weigh the necessity of precise identification against the resulting risks to its own pilots' safety and it must balance the need to protect the civilian population on the ground with the need to protect civilian aircraft which enter into air defense zones without filing flight plans.

Such delicate appraisals of relative dangers were not ultimately consigned by Congress to the courts. Courts are not in a position to dictate to a branch of the Department of Defense how it should react when it faces unknown and potentially hostile aircraft. Myriad possibilities for mischievous judicial inquiry abound: whether planes should have been sent at all; the proper number of planes; the routes they flew; the angles of the intercepts; the correct distance from the target; the proper reaction to weather conditions; the quality of the on-board radar system; the compatibility of communications systems. The list of inquiries is virtually endless and the umbrella of negligence would encompass them all. Courts cannot impose their own concept of "the prudent intercept" on NORAD. Judges have no "judicially discoverable and manageable standards for resolving" whether necessities of national defense outweigh risks to civilian aircraft. *Baker v. Carr*, 369 U.S. at 217. Nor can we even "undertak[e] independent resolution without expressing lack of the respect due coordinate branches of government." *Id.* Any judgment we might render would lay upon NORAD a strata of tort law which would be both capricious and confining in its impact.

III.

Tiffany argues nonetheless that this court can award her a recovery without expressing any lack of respect for coordinate branches of government. In her view, the protected decisions with which we should not interfere have already been made in the form of NORAD and USAF regulations, manuals, and procedures. Thus, she contends, the court can inquire into whether government agents followed those regulations without exercising authority to which it is not entitled. *See Berkovitz v. United States*, 486 U.S. 531, 536 (1988). An alleged failure to follow regulations is not only justiciable, she believes, but presents a case of actionable negligence.

Three reasons counsel rejection of this argument. First, the mere fact that NORAD established routine operating procedures cannot convert this dispute into a justiciable issue when so many other factors counsel against judicial intervention. Second, we do not believe that each NORAD or Air Force regulation that designates internal operating procedures automatically gives rise to an actionable duty in tort to comply with them. Third, an examination of the regulations in question reveals that they actually reserve a great deal of discretion for the parties who must conduct the defensive maneuvers.

First, to say that because internal regulations exist, the barriers to judicial involvement are removed is too simple a proposition. Instead, we must inquire "into the precise facts and posture of the particular case" while noting "the impossibility of resolution by any semantic cataloguing." *Baker v. Carr*, 369 U.S. at 217. Even if we were to agree that the regulations provided standards against which NORAD's conduct could be measured, that conclusion would hardly compel that the courts do so if other "prudential considerations" counseled against it. *Goldwater v. Carter*, 444 U.S. at 998 (Powell, J., concurring).

Here, we conclude that precisely such other powerful factors foreclose judicial entertainment of Tiffany's assertions. Those factors have been discussed at length in the preceding section and shall not be repeated here. Simply put, NORAD must

have some freedom to design and to conduct missions with regard to hostile aircraft without fear that courts will afterwards assess damages in the belief that the mission might have been accomplished better. The presence of regulations does not change the reality that legislative and executive oversight of these particular military missions is to be preferred to that of the judiciary. Each intercept may present a unique situation and demand a different response dependent not only upon factors such as the prevailing weather conditions and available information, but upon the state of foreign relations and international tensions. In adapting to such variable circumstances, the extent of compliance with relevant NORAD manuals and regulations may be anything but clear. Indeed, determining the extent of compliance with operating procedures and regulations can itself be an endlessly argumentative exercise. This determination must be in the first instance a matter for military judgment, subject always to the "power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system . . . ." *Gilligan v. Morgan*, 413 U.S. at 10.

We do not hold, of course, that any time a branch of the military asserts a national defense interest to justify its acts, the court must avert its eyes. The military does not enjoy a blanket exemption from the need to proceed in a non-negligent manner. When conducting training exercises, for example, or acting in a civilian arena, national defense interests may be more remote and the military faces different restrictions. *See, e.g., Peterson v. United States*, 673 F.2d 237 (8th Cir. 1982) (B-52 plane on training mission liable for flying too low in altitude); *Ward v. United States*, 471 F.2d 667 (3d Cir. 1973) (Air Force might be liable for negligently causing sonic booms). Nor do we here address the situation where a civilian pilot properly filed and activated a flight plan and the government negligently misplaced it. Those are different circumstances from ones where actual military force was initiated to investigate a potentially hostile aircraft.

We also cannot accept Tiffany's assumption that NORAD regulations automatically create an actionable duty in tort

towards civilians. Tiffany does not argue, as did the plaintiffs in *Berkovitz v. United States*, 486 U.S. 531 (1988), that the government violated any federal laws contained either in statutes or in formal published regulations such as those in the Code of Federal Regulations. "There can be no doubt that the mandate of a federal statute is a far stronger foundation for the creation of an actionable duty . . . than [an] administrative directive . . . . " *Zabala Clemente v. United States*, 567 F.2d 1140, 1150 (1st Cir. 1977). As the First Circuit explained while addressing whether FAA inspectors owed a duty to the public:

> [P]laintiffs cannot use the implicit sovereignty of the government to argue that all its internal communications establish standards of care similar to those created by duly promulgated laws of general application. Not all acts and orders of the United States government are so sovereign that they must be treated as commands which create legal duties or standards, the violation of which involves breaking the law. A considerable part of the government's conduct is in the context of an employer-employee relationship, a relationship which includes reciprocal duties between the government and its staff, but not necessarily a legal duty to the citizenry.

Zabala Clemente, 567 F.2d at 1144. The court finally concluded that an order to FAA staff to conduct inspections, although mandatory, did not create an actionable duty to passengers: "[w]e do not believe the Federal Tort Claims Act was intended to expose the government to such limitless liability . . . . " *Id.* at 1146.

Similarly, when Soviet military aircraft shot down a commercial airliner that had strayed into Soviet air space, relatives of passengers killed in the crash argued that NORAD should have warned the airliner of its position. The alleged duty to warn was based on Alaskan NORAD Region/Alaskan Air Command Regulation 60-1, which provided: "[i]f it looks like an aircraft is lost or may enter the Alaskan non-free flying area . . . tell the nearest Federal Aviation Administration Flight Service Station for civil aircraft . . . . " *In re Korean Air*

Lines Disaster of September 1, 1983, 646 F. Supp. 30, 34 (D.D.C. 1986). While it was undisputed that the regulation was an internal military directive that was binding on military personnel, the court held that "[t]he testimony of personnel working on an operational level that they believed they were required to obey Reg. 60-1 does not support Plaintiffs' contention that the United States owed a duty to Plaintiffs' decedents." *Id.* The regulation was simply inadequate to show that the United States had "assumed ultimate responsibility for rescuing civilian flights." *Id.* at 34-35.

Tiffany has similarly not shown that NORAD guaranteed through operational procedures the safety of all civilian aircraft which enter an ADIZ without a flight plan. On the contrary, it is difficult to see how the government actually could make such a guarantee. Moreover, to base tort liability in this situation on a failure to follow internal regulations would have few positive outcomes. NORAD might well respond by setting fewer procedures and regulations if each could give rise to civilian tort suits. Such action could only result in increased confusion and a loss of military efficiency. Nor would any worthwhile goals be achieved if NORAD were to state in boilerplate throughout its regulations that the rules are not meant to create tort duties, or if NORAD responded by promulgating regulations of a most permissive nature, designed to retain maximal flexibility. Reflection upon such consequences underscores the dangers of the intrusion of undue tort liability into NORAD's regulatory calculus.

Finally, many of the regulations that Tiffany argues were not followed actually preserve significant discretion for the necessary actors. For example, NORAD Regulation 55-14 (May 5, 1980) addresses the procedures for identification of air traffic:

> Once intercept action has been initiated against an "Unknown," positive visual recognition will be completed within tactical and safety limitations, unless the track can be positively reclassified "Friendly" by other means prior to intercept. If there is reasonable doubt as to validity of identification information . . . visual recognition will be completed.

NORAD Regulation 55-14 ¶ 6.b.4 (May 5, 1980). Large areas of discretion reside within the above directive. The regulation does not explain what circumstances might give rise to "reasonable doubt" about the validity of information, for example.

Perhaps more importantly, the duty to identify rests on the classification of the target aircraft as an "unknown," and that classification is discretionary. The regulation lists many methods by which a plane can be declared "friendly" but does not require NORAD to so declare it even when the conditions have been fulfilled. Instead the methods are merely permissive:

> A track *may be* classified "Friendly" if it follows a plan of flight in accordance with a prior arrangement between the ADCF concerned and the aircraft operator[;] . . . voice authentication over air/ground channels . . . *may be* used as a means of determining the "Friendly" identity of military aircraft[;] . . . [if] there is a strong possibility that the aircraft in question should correlate with a flight plan received by the NORAD system, the track in question *may be* declared "Friendly" if it is transmitting a MODE 3/A code assigned by FAA/TC[;] . . . Positional information obtained [via ATC agencies] *may be* used to establish a reclassification of "Friendly."

Id. ¶¶ 6.a.4, 6.a.6 to 6.a.8 (emphasis added). Not only are the classification requirements permissive; they are also fluid. Aircraft can be relabeled based on subsequent information received at any time. *Id.* ¶ 5.c.1. Paragraph 6.b.2 allows controllers to classify as "unknown" "[a]ny track, regardless of its location, creating suspicion as to its intent by reason of course, speed, altitude, radio/telephone procedures, maneuvers, flight size, ECM activity, or other abnormality to an extent that further investigation is deemed advisable." These regulations make clear that NORAD's categorization of aircraft and decisions as to the necessity of completing a visual identification are discretionary in a way that would likely be immunized, even under Tiffany's proposed analysis.

Many of the tactics employed to conduct the intercept are similarly discretionary in nature. An attachment to NORAD

Regulation 55-14 instructs that "VFR and IFR interception patterns will be in accordance with standard tactics prescribed by the component command to whom the interceptor is assigned." Attachment 2 ¶ 1.e. Thus tactics may vary from command to command. In addition, the United States Air Force Interceptor Weapons Instruction Manual 51-14 (May 15, 1978) informs pilots to "[k]eep in mind that there should never be a 'standard' tactic and that the areas mentioned here are more aimed at thought processes than actual solutions." Ch. 6 (Visual Identification Intercepts) 6-1. The district court observed that pilots also retain the authority to "call a Judy," or to take control of the intercept through use of on-board radar. Finally, Regulation 55-14 ¶ 9 explains that "NORAD/ADCOM region commanders are authorized to supplement this regulation, as required, to establish specific responsibilities and operating procedures for their area."

To hear Tiffany describe an intercept, the whole operation is simply a rote mechanical exercise. Actually it is in significant respects flexible and judgmental in nature. Tiffany's assertions that NORAD was negligent in not classifying the Baron as "friendly" more quickly and in approaching it at a wrong angle, for example, fall into the realm of discretion reserved by the regulations themselves.

Therefore, the presence of NORAD regulations which speak to intercept procedures does not change our analysis. We continue to believe that the issues raised by Tiffany are not for resolution by the courts, but are best left to those branches of government whose expertise is greater and whose political accountability is more direct.

IV.

It should be obvious that NORAD's military strategy does not project midair collisions as an element of the nation's defense. It should also be apparent that NORAD possesses a keen interest in the safety of its own personnel and in that of other pilots and passengers. Because manned intercept procedures will always place NORAD's own reputation, equipment, and personnel at risk, the intercept system itself has incentives to assure the safety of those who use the air. To

redesign the incentives through tort law, however, holds hazards of its own. This tragedy occurred in midair; an aircraft undetected by a risk-averse defense system might one day visit a different sort of disaster, as lamentable in its own way as this one is.

The judgment of the district court is reversed and the case is remanded with directions to dismiss. The government's counterclaim is also dismissed.

REVERSED AND REMANDED

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA CHARLOTTESVILLE DIVISION

PATSY O. TIFFANY, Administratrix, and Personal Representative of the Estate of Henry H. Tiffany, Deceased, *Plaintiff* v. UNITED STATES OF AMERICA, *Defendant and Third-Party Plaintiff,* v. BRANDON LADD CORPORATION, *Third-Party Defendant* (In Re Air Crash Off Cherry Point, North Carolina, January 9, 1983)	CIVIL ACTION NOS. 84-0100-C 85-0004-C 85-0040-C 85-0048-C 85-0052-C *MEMORANDUM OPINION* HON. JAMES H. MICHAEL, JR.

This matter arises out of a mid-air collision off the coast of North Carolina at approximately 16:44:46 EST on January 9, 1983, between a civilian aircraft, a Beechcraft Baron BE 55, and an F4-C phantom interceptor. The cause of action arises under the Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 et. seq. Plaintiff has brought the action on behalf of the estate of the deceased, Henry Tiffany, pilot of the Baron, and is seeking damages for pecuniary loss only, pursuant to 46 U.S.C. § 762. *Offshores Logistics v. Tallentire*, 477 U.S. 207 (1986). Defendant United States has counterclaimed for $209,895 against third-party defendant Brandon Ladd Corporation, the lessee of the Baron Aircraft, for damage to the F4-C. Brandon Ladd seeks $45,000 from the United States for loss of the Baron.

After presentation of the evidence to this court, the respective parties have moved for judgment in their favor. Having carefully considered the evidence, this court, sitting as the sole trier of fact, finds that defendant United States bears

the liability for the collision and, as such, grants plaintiff's motion for judgment and awards plaintiff damages in the amount of $1,394,342.00. Since this court finds the actions of the United States constitute the proximate cause of this accident, the court denies the United States' motion for judgment against Brandon Ladd Corporation and finds that Brandon Ladd is entitled to recover $45,000 as a consequence of the loss of its Baron Aircraft.

I.

At the time of his death, decedent Henry Tiffany was an experienced pilot with approximately 4,455 flying hours. He was fully certificated and sufficiently experienced to make the flight in question. Decedent possessed an instrument rating which meant that he was qualified to fly in instrument meteorological conditions. At approximately 13:00 EST, January 9, 1983, decedent submitted a flight plan at the Nassau, Bahamas, Airport which called for a flight to Norfolk, Virginia, via Wilmington, North Carolina. Pilots are required to enter flight plans when the intended flight would take the craft through the Air Defense Identification Zone (ADIZ). 14 C.F.R. § 99. Decedent's attention was directed by the flight service station supervisor to a Notice to Airmen (NOTAM) advising pilots entering the United States from the Caribbean that they should clear customs at certain designated Florida airports. Apparently because of the NOTAM, decedent refiled a flight plan listing Fort Pierce, Florida, as his initial touchdown point.

After leaving Nassau, decedent did not follow the accepted practice of "activating" his flight plan by contacting the flight service station. If not activated within an hour after takeoff, filed flight plans are considered void and decedent's revised flight plan which had been filed with the Nassau flight service station was then marked "DNA" [Did Not Activate]. Communications with the Bahamas being uncertain, it is possible that decedent attempted to modify his flight plan after takeoff. The court can only find that the plan was in fact not activated, but the court also declines to read into this apparent omission any intent on the part of decedent to deceive

NORAD (North American Aerospace Defense Command) regarding the point of decedent's penetration of the ADIZ.[1]

Rather than flying to Fort Pierce, Florida, decedent instead headed north, as would have been called for by his initial flight plan. At approximately 16:07:40, radar trackers at the NORAD control headquarters at Fort Lee, Virginia, ("FERTILE Control") detected an unidentified aircraft flying north toward the North Carolina coast. Since FERTILE Control had no flight plan correlating to that radar track, the aircraft was declared unknown. A responsibility of NORAD is to track and identify aircraft penetrating the ADIZ. If a radar target correlates with a filed flight plan, then the target is declared friendly and it receives no additional NORAD attention. If the target is classified as an unknown, it can be declared as a friendly in one of two ways: either by obtaining positional information from Air Traffic Control (ATC) centers which will correlate with the unidentified target or by identification pursuant to an interception.[2]

Pursuant to the designation of the Baron aircraft as an unknown track, two F-4 phantoms were scrambled from Seymour Johnson Air Force Base in Goldsboro, North Carolina, to make an official identification of the Baron. After the scramble, decedent attempted to contact the ATC facility in Leesburg, Virginia (ARTCC) at 16:30:32. Apparently, he received no immediate response but ARTCC did acknowledge the call at 16:31:26, referring to decedent's aircraft call sign "7142N." In this exchange, decedent told ARTCC that he estimated his position to be approximately 50 miles south of New Bern, North Carolina, an incorrect estimate, and his altitude to be 9500 feet. Decedent requested radar assistance to help him avoid some weather cells and informed ARTCC

1. Nor do the vagaries of decedent's eventual flight plan or his initial, incorrect estimate of his position off Wilmington, North Carolina, discussed *infra*, suggest to this court any intent on decedent's part to evade detection. The claim of the United States to the contrary is effectively rebutted by the decedent's request to have the appropriate personnel ready so that he might clear customs when landing in Norfolk.

2. Alternatively, an aircraft with a true air speed of less than 180 knots can be classified as friendly. The record shows that decedent's true air speed at this time was in excess of 180 knots.

that he was "squawking 1200," i.e., that the Baron's transponder was emitting a nonspecific squawk which denotes visual flight rules.[3] At 16:37:04, decedent communicated to ARTCC that he had recalculated his position to be 56 miles from the Wilmington VOR, a groundbased navigational transmitter. In his communication, decedent also identified for ARTCC the make and model of his aircraft.

By 16:37:42, ARTCC had passed to FERTILE Control information about the Baron's position, call sign, altitude, and aircraft type. While this information was sufficient under NORAD regulations to justify reclassifying the Baron as friendly, the ATC officers sought to confirm this information. The initial pass for a visual identification by the F-4s was cancelled by FERTILE Control because they were "coming in too hot," that is, their angle of approach was too sharp for an effective identification. The only information passed to the F-4s was that their target was "at approximately 9000 feet." Since the F-4s communicated on military frequencies and the Baron on civilian frequencies, the aircraft could not speak directly to each other. Thus, data emanating from either the F-4s or the Baron had to be relayed to ARTCC and FERTILE Control and only after that thence to the other protagonist. The court also finds that the F-4s were not given a local altimeter setting when the aircraft descended below 18,000 feet so that their altimeters could be recalibrated for an accurate altimeter reading. Thus, during the entire intercept procedure, the altimeter of the F-4 involved in this collision, JL-26, failed accurately to reflect its true altitude.

After repositioning, the F-4 which eventually collided with the Baron obtained the Baron on its radar at 16:41:18 and at 16:41:54 "called a Judy" (indicating that this aircraft, JL-26, was taking control of the intercept and was using its on-board radar to complete the identification). At virtually the same time, 16:41:55, ARTCC requested that the Baron perform an "IDENT," a procedure which causes the transponder to emit a specific identification signal. Following this "IDENT,"

3. The transponder enhances the aircraft's presence on a radar screen and transmits additional information which assists in identifying the aircraft.

ARTCC advised FERTILE Control at 16:42:20 that "We just had this . . . Four Two November IDENT and that is him down there at Juliet Lima's [the F-4C] twelve o'clock and . . . 6, 7 miles." The ARTCC transcript shows that FERTILE Control responded with a "Roger," although the FERTILE Control transcript omits part of the message. However this court discounts the contention of the government that parts of the transmission were "stepped on" and that the entire transmission was not intelligible to FERTILE Control, since FERTILE responded with a "Roger," indicating that a message understood as complete was received and comprehended.[4]

This court finds that information sufficient to identify the Baron was available by 16:37:42. However, even if the package of data was believed in good faith to be incomplete at that time, it is abundantly clear that data which would have justified aborting the intercept was passed from ARTCC to FERTILE Control at 16:42:20. However the confirmed identification received at 16:42:20 was not passed to the identification section at FERTILE Control until 16:43:57. The FERTILE Control Officer in overall control, the senior director, did not order the intercept terminated until 16:44:21 and this order was not passed to JL-26 until 16:44:42, only 2 seconds before the collision. In addition, the printout of the Semi Active Ground Environment (SAGE) system of FERTILE Control indicates that the status of the Baron was changed to friendly at 16:43:42.

After the JL-26 obtained the Baron on radar and "called a Judy," it proceeded to close on the Baron. Ostensibly, the mission of the F4-C was to identify the aircraft visually, but

4. While the court finds that the response of "Roger" is sufficient to indicate that the entire message was received, it would have been preferable for the trier of fact to have had access to the tapes or, at the least, to a full and accurate transcript of the tapes which would be beyond contention between the parties. A transcript of the ARTCC tapes was available but, according to the government, it was not possible to furnish a rerecording of the original FERTILE tapes because no machine is now available for playback. Initially, the government was able to make a transcript from the tapes for the accident report. However, the court is concerned that the FERTILE tapes are now, allegedly, quite inaccessible.

JL-26 reported that it was flying "Popeye" (under conditions of restricted visibility). This observation does not mandate a finding that the decedent was either in error or deceitful when he earlier reported good visibility by squawking 1200, for decedent did request assistance at that time in avoiding weather cells and, quite obviously, the meteorological conditions are capable of rapid change. Both the pilot and the weapons systems office (WSO) in charge of radar in JL-26, believed that the Baron was above and to the right of their F4-C. The pilot and WSO were under different impressions about the amount of vertical separation between their craft and the Baron. The pilot was operating under the assumption that there was 500 feet of vertical separation, while the WSO believed there was 1,000 feet of vertical separation. However, because the F-4Cs had not been given the new altimeter setting, JL-26 was actually 180 feet closer to the Baron vertically than either the pilot or WSO believed.

JL-26 closed on the Baron with an overtake speed of 127 knots at the time of the collision. As JL-26 closed on the Baron, the radar system of the F4-C displayed a "Break X" configuration, the symbol that the F4-C had approached so close to the target that the missiles of the F4-C could not be utilized. After the Break X display, and the receipt from FERTILE Control of the identification of the Baron, JL-26 applied full throttle without afterburners and initiated a left turn. The collision immediately ensued, the left wing of the F4-C slicing through the right side of the Baron Aircraft. The National Transportation and Safety Board (NTSB) Collision Reconstruction Report concluded that there was a 4 degree difference between the bank angle of the Baron and that of the F4-C. This conclusion is based on the NTSB assumption that JL-26 was in a 30 degree left bank, an assumption based on the recollection of the pilot of the F4-C. The government contends that the Baron turned left into the path of JL-26, crossing the intended path of JL-26 so that the right side of the Baron was to the left of the JL-26, but the United States has not been able to prove that the Baron had initiated such a turn and, more importantly, the radar data does not positively indicate any such turn. The collision resulted in the death of

the pilot and all passengers aboard the Baron. The F4-C, although sustaining considerable damage to its wing, was able to return to its base.

II.

The proximate cause of the collision was negligence by the crew of JL-26 and the FERTILE Control personnel. While decedent's decision to fly back to the United States from Nassau and the particular flight path which he chose to pursue obviously set into motion the series of events which resulted in the collision, those actions were sufficiently remote and set the stage for the superceding acts of negligence by defendant United States.

The government has argued that decedent set in motion a chain of events which should have been foreseeable to, and anticipated by, the decedent, and claims that this foreseen chain of events must include the collision itself. For example, the United States argues, decedent should have foreseen that penetrating the ADIZ while flying over 180 knots and without having filed an activated flight plan would result in an attempted intercept. This may well be true, but it does not serve to protect the government from liability, for while decedent should perhaps have anticipated that an intercept would be attempted against an unidentified penetration of the ADIZ, he should not have been expected to have foreseen the inappropriate actions of FERTILE Control and of the F4-C crew. The initial classification of the Baron as unidentified was foreseeable, but not the eventual collision. Decedent himself attempted to relay sufficient information to ARTCC (and, presumably, thence to FERTILE Control and the intercepting aircraft) to have the intercept aborted. Decedent's actions, some of which were concededly less than optimally prudent, may be background conditions of the eventual collision, but they do not constitute the proximate cause. *United States v. De Vane*, 306 F.2d 182, 187 (5th Cir. 1982).

FERTILE Control had sufficient information, within ample time, to have terminated the intercept. Ground control failed to give to the F4-C pilot the prompting and information necessary for him to reset his altimeter. Finally, the F4-C

continued a mission designed for a visual identification in weather effectively precluding such an identification, misidentified the position of the Baron aircraft relative to its position, turned left and ascended when the procedures called for a descent and a right turn, and failed to maintain the proper amount of vertical separation. Therefore, the conditions which decedent created cannot be considered to be the proximate cause of the collision because of superseding negligence of FERTILE Control and the F4-C crew. That superceding negligence severed any putative causal connection between decedent's actions and the collision. *Moorehead v. Mitsubishi Aircraft Internat'l Inc.*, 639 F. Supp. 385, 391 (E.D. Tex. 1986).

In its efforts to discern the causal chain, this court found the testimony of one of the government's own witnesses, Lt. Col. Smith, to be particularly relevant and helpful. This witness, an Air Force officer with a great deal of interceptor experience as a participant, supervisor, and instructor, testified eloquently to the responsibility which the interceptor crew bears for the conduct of the intercept. Col. Smith stated that an intercept pilot must be prepared to meet *any* action an intercepted aircraft might take. By all his testimony, it is clear that it is part of the mission of the interceptor to anticipate any possible sudden maneuvers by the overtaken aircraft. An intercepting pilot cannot assume that the overtaken craft will keep to the same course and heading or take any given maneuver. This is why a safe vertical separation and a limited overtake speed are benchmarks of the prudent intercept. The very purpose of an intercept is to identify a target not meeting the criteria necessary to classify an aircraft as friendly. Even if one does not impute a necessarily hostile intent to the unidentified target aircraft, one must assume its intent is unknown. Therefore, both the FERTILE ground support personnel and the crew of any intercepting aircraft must be prepared to expect a range of possible action by the unidentified aircraft.

The finding by this court that the collision was proximately caused by negligence on the part of defendant United States renders moot any question of the liability of defendant

Brandon Ladd Corporation for the damage done to the wing of the F4-C.

III.

The amount of loss to Brandon Ladd Corporation from the destruction of the Baron aircraft has been stipulated by Brandon Ladd and the United States as $45,000. Since the court has found the United States to be liable for the collision, Brandon Ladd is entitled to recover the damages ensuing from the loss of the Baron.

Plaintiff is entitled under DOHSA to recover on her pecuniary loss only. 46 U.S.C. § 762. Plaintiff offered evidence relating to pecuniary loss stemming from the end of decedent's law practice and from the diminution of decedent's net worth. Decedent spent approximately half of his working time on real estate development and plaintiff seeks damages from the diminution of decedent's net worth which flows from real estate development.

This court declines to grant plaintiff damages on the loss of net worth which is alleged to have resulted from decedent's death. The damages represented by plaintiff's claim about net worth refer not just to an income stream, but to an accumulation and the growth of that accumulation. This growth is assuredly not dependent solely on the continued existence of decedent, as would be the income stream from a specialized occupation like the practice of law. Upon decedent's death, his net worth did not suddenly evaporate. This court cannot award damages on the basis of what real estate projects decedent might have developed and how profitable those conjectural projects might or might not have been. Furthermore, plaintiff cannot use as evidence of what would have been an increase in decedent's net worth (had he lived), the fact that plaintiff disposed of a number of decedent's holdings for sums which were assertedly less than market value. Plaintiff's claim for damages based on the dissipation or even diminution of decedent's net worth are rejected as too speculative.

Plaintiff offered evidence which established that decedent's income from his law practice had averaged $72,030 per year for the three years immediately preceding his death. An expert economist used the average growth rate of attorney's income, a discount rate based upon current rates of interest, and a personal consumption factor[5] to estimate that the loss of income from decedent's practice of law is $1,394,342, if decedent practiced until he was 65 and $1,747,909 if he practiced until age 70. Since the customary age for retirement is 65 and since plaintiff has offered no evidence that decedent was likely to have practiced law until age 70, the court finds that the damages to plaintiff should be constituted by the loss of income from decedent's practice of law to age 65 only.

The United States offered no evidence by expert witnesses or otherwise (except as noted below) to counter or qualify the testimony of the expert economist, so that the expert's evaluation, *qua* expert, stands uncontradicted.

The United States offered evidence purporting to show that even if Tiffany had continued to practice law, he would have met with less success than he had in the past. A local Charlottesville attorney testified that he believed decedent had a bad reputation among the Charlottesville bar, that he was not a trustworthy attorney, and that his professional relationships were marked by an absence of fair dealing. However, this testimony establishes considerably less than it purports to. First, this testimony is not sufficiently concrete even to be called anecdotal. Rather, it consisted of conclusory statements and expressions of opinion of the sort more suitable for determining inclusion in a club than evaluating professional standing. Second, the lawyer testified that he practiced very little in Augusta County and the City of Waynesboro, concededly the center of decedent's practice. Finally, when it comes to an evaluation of the hypothetical health of Mr. Tiffany's legal practice, the crucial variable may

5. The court remains somewhat skeptical about the very low personal consumption factor, fifteen percent of annual income, used by plaintiff in calculating lost income from decedent's practice of law. However, defendant United States offered no evidence to rebut this figure and so the court concludes that it should be accepted.

not be the regard with which at least some other attorneys held Mr. Tiffany, but the regard in which his universe of clients, past, present, and potential, held decedent. One attorney with a long-standing practice of considerable size in the Waynesboro area testified that Mr. Tiffany's reputation among his clients was quite good.[6]

Defendant United States did, however, proffer evidence which purports to show that decedent would have been disbarred and, thus, plaintiff herein merits no award of damages based on any loss of income from the practice of law. The United States has attempted to place into evidence an agreement between the decedent (and plaintiff, his wife) and the United States to provide immunity in exchange for information described within the agreement as "privileged."[7] Initially, this court had doubts as to the admissibility of this document out of a concern that the reasoning underlying what are generally described as "Dead Man's Statutes" would render the document inadmissible. However, this action proceeds entirely under a federal statute, and "With respect to federal issues, no Dead Man's Statute is effective." *See*, 2 S. Saltzburg and K. Redden, *Fed. R. of Evid. Manual*, 268 (1977). Thus, as to this point, the court concludes that the document may properly be admitted in evidence. However, as to this document, additional serious concerns are presented, as set out *infra*. While outside the linear reasoning determining the legal effect of this document, there are matters concerning it which deserve comment.

First, this court is concerned about the way this agreement appears to have been unearthed and utilized. Initially, there is the question of the very propriety of such an agreement by which an officer of the court, under the aegis of the United States, seems to violate a basic ethical obligation and disciplinary rule of the legal profession, relating to concealing

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6. This lawyer's testimony also showed that within his professional strata, decedent's reputation was also quite high among other attorneys in the Waynesboro-Staunton-Augusta County area.

7. By the terms of the agreement, the government is promising not to disclose any information gained by decedent's statement to the Assistant United States Attorney to the Virginia State Bar.

conduct by a licensed attorney-at-law which the United States now contends is proof of strongly criminal activity on the part of that lawyer.[8] Further, this court is concerned, though to a lesser degree, by the way that the actions of the United States, in divulging the contents of this document, fly in the face of the legal maxim that "the word of the sovereign is its bond."

Perhaps there is some rule or practice or procedure available to the attorneys for the government to engage in this conduct; if so, that fact is unknown to this court and no evidence to show any such license to do so has been presented. If such a rule or practice or procedure does in fact exist, then either that license to act must be changed or the Canons of Professional Responsibility must be changed to accommodate that practice or rule or procedure.

It is true that where serious crime is involved, "government agents may lawfully use methods that are neither appealing nor moral if judged by abstract norms of decency." *See United States v. Bogart*, 873 F.2d 1428, 1438 (9th Cir. 1986). Even if true, this quotation gives concern, for it verges too close for comfort on an "end justifies the means" argument. Justice Brandeis, in dissent, dealt succinctly with that argument when he stated, "to declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution." *See Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

Again, the court notes that these comments lie outside the appropriate reasoning in determining the proper legal effect to be given to this statement.

There has been considerable doubt raised about the admissibility of this evidence, this court having reserved ruling on its admissibility until the factual pattern had been fully

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8. "A lawyer having information indicating that another lawyer has committed a violation of the Disciplinary Rules that raises a substantial question as to that lawyer's fitness to practice law in other respects, shall report such information to the appropriate professional authority. . . " DR 1-103, Rules of Va. Sup. Ct. Pt. 6, § II.

developed.[9] The principal doubt related to the rationale of the Dead Man's Statutes, but, as noted *supra*, this has been resolved in favor of admissibility. The sticking point of admissibility is not alone ultimately dispositive because even if this evidence is admissible, the court finds that it lacks sufficient probative value to sustain the proposition for which it is tendered by the United States. In assessing its probative value, the court first looks at the facial assertion of the evidence and then at the likelihood that this initial assertion will not only turn out to be true but will set into motion all the intermediate steps conveying the probity of the initial assertion to its final thesis.

In this case, the court must examine the likelihood that the statement would lead with some degree of certainty to the disbarment of the decedent. Although the initial assertion, that is, of criminal conduct of the decedent, is set out in the statement, the United States has not shown that the required sequence leading to disbarment would necessarily have followed. Disclosure of the statement occurred before a United States District Court other than this court in what appears to have been an unrelated proceeding.[10] However, in order for this evidence to have sufficient probative value, the court must be convinced that the necessary intermediate inferences are all justified. The court would be called on to accept the presumption stated by the United States that the decedent engaged in criminal conduct, and from that presumption as an underpinning would draw the inference that the decedent would have been disbarred. Such an inference based on a presumption cannot alone support the conclusion the United States attempts to draw, particularly where, according to the testimony of Mr. Wrenn,[11] a number

9. Since this was a court trial, no problems of taking testimony out of the presence of the jury, etc., were raised by reserving this ruling.

10. This court is careful to note that the judge acted promptly and with perspicuous conscientiousness in immediately meeting his professional obligations and passing the information to the State Bar.

11. The United States called upon an attorney, Mr. Wrenn, whose private practice now involves representing lawyers in bar disciplinary proceedings and who previously was first, Bar Counsel and then Special Counsel to the Virginia State Bar. Mr. Wrenn testified to the inverted

of intermediate steps of investigation, hearings, and appeals would have to occur before the conclusion advanced by the United States would have occurred. There is no record evidence that any of these steps had been taken or even initiated. The record only discloses that the statement had been referred by the judge to an appropriate member of the disciplinary body in the decedent's jurisdiction. That is, this court would have to find that decedent would have lost his case at every point in the State Bar disciplinary process and would have received the ultimate sanction of disbarment. This court refrains from reaching that conclusion, especially since this information was, by virtue of the proper action taken by the federal judge who became aware of the allegations or admissions in the agreement, in the possession of that disciplinary body for a period prior to the death of the decedent and, as stated, no action disclosed in the record had been taken against the decedent. The court finds that the evidence proffered by the United States which purports to show that decedent would have been disbarred has insufficient probative value to support that conclusion.

IV.

This court finds that the proximate cause of the collision between decedent's aircraft and the F4-C interceptor were the superseding negligent acts of defendant United States. It further finds that defendant United States is liable to plaintiff in the sum of $1,393,342.00 due to lost income from his practice of law, and to defendant Brandon Ladd Corporation the sum of $45,000 for the loss of its aircraft.

"cursus honorum" which would have eventuated if a disciplinary action against decedent had been pursued. While Mr. Wrenn certainly qualifies as an expert in the machinations of state bar governance procedures, he does not qualify as an expert in sibylline procedures or soothsaying. Indeed, Mr. Wrenn testified that "My entire opinion is based on a hypothesis." Mr. Wrenn could not predict what would have happened with regard to state bar proceedings had decedent lived and, in point of fact, Mr. Wrenn took some care to avoid such speculation. The testimony of Mr. Wrenn is not helpful to the government in its attempt to undercut plaintiff's plea for damages due to lost income from decedent's practice of law, because Mr. Wrenn cannot testify to facts unique to decedent's specific situation.

An appropriate Order shall this day issue.

ENTERED: _____
Judge

_____
Date

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

April 30, 1991

To: John J. Tigert VI, Esq.
Kathryn Amelia Ledig, Esq.
Thomas Barton Almy, Esq.
E. Montgomery Tucker, Esq.
Michael John Pangia, Esq.
Frank Anthony Mika, Esq.

NOTICE OF JUDGMENT

Judgment was entered this date in Case Number(s): 90-3014
90-3022

The Court's opinion is enclosed.

* * *

JOHN M. GREACEN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed
July 3, 1991

No. 90-3014

PATSY O. TIFFANY, Administratrix and Personal Representative of the Estate of Henry H. Tiffany, Deceased
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
Defendant & Third Party Plaintiff-Appellant,

versus

BRANDON LADD CORPORATION,
Third Party Defendant-Appellee.

No. 90-3022

PATSY O. TIFFANY, Administratrix and Personal Representative of the Estate of Henry H. Tiffany, Deceased
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant & Third Party Plaintiff-Appellee,

versus

BRANDON LADD CORPORATION,
Third Party Defendant-Appellee.

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to the Court. In a requested poll of the Court, Judge Murnaghan voted to rehear the case in banc; the other active circuit judges voted to deny rehearing in banc.

As a majority of the judges voted to deny rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc is denied.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Wilkins and Judge Ellis, United States District Judge for the Eastern District of Virginia, sitting by designation.

For the Court,

_____

Clerk

(2)

FILED

DEC 2 1991

OFFICE OF THE CLERK

No. 91-510

In the Supreme Court of the United States

OCTOBER TERM, 1991

PATSY O. TIFFANY, ADMINISTRATRIX AND PERSONAL REPRESENTATIVE FOR THE ESTATE OF HENRY H. TIFFANY, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

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QUESTION PRESENTED

A civilian aircraft that had not filed a flight plan unlawfully penetrated the Air Defense Identification Zone along the eastern shore of the United States and collided with an Air Force interceptor dispatched to identify the plane. The question presented is whether a claim based upon alleged negligence in the execution of the military intercept is justiciable.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-510

PATSY O. TIFFANY, ADMINISTRATRIX
AND PERSONAL REPRESENTATIVE FOR THE ESTATE
OF HENRY H. TIFFANY, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 931 F.2d 271. The opinion of the district court (Pet. App. B1-B15) is reported at 726 F. Supp. 129.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1991. A petition for rehearing was denied on July 3, 1991 (Pet. App. D1-D2). The petition for a writ of certiorari was filed on September 30, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of a 1983 mid-air collision between a private airplane piloted by petitioner's decedent, Henry Tiffany, and a United States F-4 jet fighter. The fighter was one of two aircraft sent by the North American Air Defense Command (NORAD) to intercept and identify Tiffany's airplane, after Tiffany unlawfully entered the Air Defense Identification Zone (ADIZ) along the Eastern shore of the United States without having filed a flight plan. Tiffany was on a flight from Nassau, Bahamas, toward North Carolina. While in Nassau, he was informed by Bahamian authorities that his original flight plan—which called for a direct flight from Nassau to Norfolk, Virginia—was impermissible because of U.S. Customs regulations requiring flights from the Caribbean to clear customs in one of several designated Florida cities. See 19 C.F.R. 6.14 (1983). Although he modified the flight plan to provide for a stop in Fort Pierce, Florida, Tiffany failed to activate the modified plan when he left Nassau and flew directly north toward North Carolina. Pet. App. A2-A3, A4.

NORAD's peacetime mission is "to detect and identify any unusual air activity within the perimeter areas of the North American Continent which might be prejudicial to the national interests, or indicate an imminent air attack against vital targets in the United States and Canada, and to restrict violations of sovereign airspace." N/A/A Regulation 55-14 ¶ 2.a (May 5, 1980). In accordance with standard procedures, when NORAD detected Tiffany's airplane and determined that it did not correspond to any filed flight plan, NORAD classified the plane as

"unknown." Two F-4 fighters took off from a base in North Carolina to intercept and identify Tiffany's plane. Visibility was limited at the altitude at which petitioner's decedent was flying. Pet. App. A5.

In violation of regulations requiring him to contact Federal Aviation Administration air traffic controllers before he entered the ADIZ, Tiffany failed to establish radio contact with the FAA until, by his estimate, he was 50 miles off the North Carolina coast. After first misstating his position, Tiffany advised FAA controllers that he was 56 miles from Wilmington, North Carolina, and provided the make and model of his aircraft. A few minutes later, the FAA advised NORAD that it had identified Tiffany by radar. The status of Tiffany's aircraft was changed from "unknown" to "friendly"; NORAD's control officer decided to terminate the intercept; and that decision was relayed to the interceptor aircraft. Pet. App. A4-A6.

A few seconds later, one of the interceptors collided with Tiffany's plane while in the process of breaking off the intercept. Tiffany's plane fell into the Atlantic Ocean, killing all on board. The F-4 suffered damage to its wing, but was able to return to its home base. Pet. App. A6.

2. Petitioner commenced this action against the United States under the Death on the High Seas Act, 46 U.S.C. App. 761-768. After a trial, the district court found that the proximate cause of the crash was negligence on the part of NORAD's ground control personnel and the crew of the interceptor aircraft. The court found fault with various aspects of the mission—including the failure to terminate the intercept on the basis of information the court deemed to be "sufficient," the continuation of "a mission designed for a visual identification in weather effectively pre-

cluding such an identification," and actions by the interceptor pilot that the court found to be inconsistent with "benchmarks of the prudent intercept." Pet. App. B7-B8.[1] The court also rejected the government's contention that the proximate cause of the accident was Tiffany's decision to enter an ADIZ without an activated flight plan, in knowing violation of federal regulations, thus triggering a NORAD intercept. *Ibid.*

3. The court of appeals reversed the judgment and remanded with a direction to dismiss the case. Pet. App. A1-A21. Finding that petitioner's lawsuit "necessarily calls into question the government's most important procedures and plans for the defense of the country," the court concluded that her claims are nonjusticiable. *Id.* at A8. "If we were to hold that the United States acted negligently in conducting the defense of its eastern border," the court explained, "we would be interjecting tort law into the realm of national security and second-guessing judgments with respect to potentially hostile aircraft that are properly left to the other constituent branches of government." *Ibid.*

The court acknowledged at the outset that the Suits in Admiralty Act, 46 U.S.C. App. 741-752, waives sovereign immunity for DOHSA actions against the United States, but it noted that petitioner's claims were nonjusticiable nonetheless if

[1] The district court also found that the military was negligent in failing to recalibrate the interceptors' altimeters. Pet. App. B4, B7. The evidence was undisputed, however, that the F-4 that collided with Tiffany's aircraft had established its position relative to Tiffany's plane with onboard radar and had not relied on its absolute altitude vis-a-vis the ground. Thus, any error in the reading on the altimeter could not have contributed to the accident. See Gov't C.A. Reply Br. 30.

their resolution required the judiciary "to move outside the customary areas of judicial competence or if other 'prudential considerations counsel against judicial intervention.'" Pet. App. A9 (quoting *Goldwater* v. *Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring)). The court observed that the discretionary function exception set forth in the Federal Tort Claims Act and implicit in the Suits in Admiralty Act addresses those constitutional concerns and thus "inform[ed]" the court's analysis, but it also found that "the discretionary function exception alone does not capture all the important aspects of this case." Pet. App. A9-A11. Accordingly, the court went on to analyze the justiciability of the case without applying the discretionary function exception as such.

The court began that analysis by emphasizing that this case "implicates a discretionary decision of the most serious sort"—"a civilian injury that followed from actions taken in actual military defense of our country." Pet. App. A11. After reviewing authorities recognizing the predominant role that the Legislative and Executive Branches play with respect to military matters, the court held "that Tiffany cannot reshape the national response to threats of hostile air attack through the mechanism of tort law." *Id.* at A13. Because "[t]he executive and legislative branches have accorded NORAD the authority and the substantial responsibility of protecting the nation's borders," the court explained, NORAD "must weigh the necessity of precise identification against the resulting risks to its own pilots' safety and it must balance the need to protect the civilian population on the ground with the need to protect civilian aircraft which enter into air defense zones without filing flight plans." *Id.* at A14.

The court found that "[s]uch delicate appraisals of relative dangers were not ultimately consigned by Congress to the courts." Pet. App. A14. "Judges have no 'judicially discoverable and manageable standards for resolving' whether necessities of national defense outweigh risks to civilian aircraft," the court explained, and the judiciary cannot "even 'undertak[e] independent resolution without expressing lack of the respect due coordinate branches of government.' " *Ibid.* (quoting *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)).

The court rejected petitioner's contention that the court could properly decide the case by "inquir[ing] into whether government agents followed" NORAD and Air Force regulations, manuals, and procedures. Pet. App. A15. The court cited three reasons for that conclusion (*ibid.*):

> First, the mere fact that NORAD established routine operating procedures cannot convert this dispute into a justiciable issue when so many other factors counsel against judicial intervention. Second, we do not believe that each NORAD or Air Force regulation that designates internal operating procedures automatically gives rise to an actionable duty in tort to comply with them. Third, an examination of the regulations in question reveals that they actually reserve a great deal of discretion for the parties who must conduct the defensive maneuvers.

The court concluded, accordingly, that "the presence of NORAD regulations which speak to intercept procedures does not change [the] analysis." *Id.* at A20.[2]

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[2] The court did not reach other grounds on which the government had sought reversal of the judgment or reduction of the award of damages in petitioner's favor. Those grounds were (1) that Tiffany knowingly assumed the risk of hazardous

ARGUMENT

This case involves a highly unusual tort claim, in which a citizen seeks damages from the United States based on "actions taken in actual military defense of our country." Pet. App. A11. The court of appeals was justified in its conclusion that the performance of such a quintessentially military mission is not properly subject to judicial review. That determination is consistent with decisions of this Court and of other courts of appeals. Further review is therefore not warranted.

1. In her zeal to obtain further review, petitioner repeatedly overstates the scope of the court of appeals' holding. We are told, for instance, that the court of appeals has "abandoned the discretionary function test altogether," that its decision "extends the doctrine of nonjusticiability far beyond its previous boundaries," that the court's reasoning renders a case nonjusticiable whenever it "can be said to somehow involve considerations of 'national security' or 'national defense,' " and that the court has held "that the Government may not be sued for operational negligence involving national security." Pet. 7, 10, 14.

There is no merit to this hyperbole. Throughout its opinion, the court of appeals was careful to stress the singular nature of this case—and, correspondingly, the limited nature of its holding. The court stressed

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operations by entering the ADIZ without an effective flight plan; (2) that the district court erred, as a matter of law, in its analysis of the proximate cause of the accident; and (3) that, in calculating damages, the district court erred in concluding that a bar complaint against Tiffany, citing his confession that he had previously engaged in drug smuggling, would have led to his disbarment and reduced his future income. Gov't C.A. Br. 28-48. Those issues would remain to be resolved if the court of appeals' judgment were reversed.

at the outset that this case involves "actions taken in actual military defense of our country." Pet. App. A11. Under its reasoning, the court was also careful to note, "[t]he military does not enjoy a blanket exemption from the need to proceed in a non-negligent manner" and might be subject to different restrictions when "conducting training exercises * * * or acting in a civilian arena." Pet. App. A16. The court specifically reserved the question whether its decision would reach a case in which a civilian pilot had properly filed and activated a flight plan. All of those situations, the court explained, present "different circumstances from ones where actual military force was initiated to investigate a potentially hostile aircraft." *Ibid.*

In short, the court's holding was limited to the unusual facts of this case, the adjudication of which entails an exceptional intrusion into military matters. The fact that the question presented by this case is unlikely to recur with any frequency is itself a sufficient basis for denying the petition.

2. The court of appeals' decision was well founded. This Court has often recognized that the judiciary should be particularly reluctant to review the propriety of military operations. *E.g.*, *Johnson* v. *Eisentrager*, 339 U.S. 763, 788-789 (1950); *Gilligan* v. *Morgan*, 413 U.S. 1, 5-12 (1973). The Constitution expressly authorizes Congress to declare war and to raise and support armies, as well as to exercise other related powers (U.S. Const. Art. I, § 8, Cls. 11-16), and reserves to the President, as Commander in Chief, the power to direct military affairs (U.S. Const. Art. II, § 2, Cl. 1). Furthermore, the judiciary is not well equipped to assess the propriety of military operations. As this Court observed in *Gilligan* v. *Morgan*, 413 U.S. at 10:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.

Under the facts of this case, these considerations support the court of appeals' conclusion that petitioner's claim is nonjusticiable. "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department * * * or a lack of judicially discoverable and manageable standards for resolving it." *Baker* v. *Carr*, 369 U.S. at 217. Adjudication of this case would also express a "lack of the respect due coordinate branches of government." *Ibid.*

It is true, of course, that "when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury." *Laird* v. *Tatum*, 408 U.S. 1, 15-16 (1972). But this case is not fairly regarded as a case of military intrusion into the civilian sector. To the contrary, by entering an ADIZ after knowingly failing to give the notice (filing of a flight plan) that would have made clear his civilian status, Tiffany presented himself to air defense authorities as a potential military threat.

As a result, the adjudication of this case necessarily entails judicial review, by means of the application

of tort law, of operations that must account for the possibility that an unidentified aircraft may be hostile. As the court of appeals recognized, in assessing the reasonableness of those matters, a court reviews quintessentially military judgments. It is wholly unpersuasive to suggest, as petitioner does (Pet. 12 n.12), that such review is indistinguishable from the adjudication of a car crash case.

In this case, for instance, the district court based its finding of liability on, among other things, its determinations that NORAD "had sufficient information, within ample time, to have terminated the intercept" and that the interceptor "continued a mission designed for a visual identification in weather effectively precluding such an identification." Pet. App. B7-B8. There is no difference, in principle, between such a determination and its converse—a ruling that the military was negligent, and thus liable, in a case in which it terminated an intercept on insufficient grounds and allowed a hostile aircraft to reach the American mainland. See *Zuckerbraun* v. *General Dynamics Corp.*, 755 F. Supp. 1134, 1140-1142 (D. Conn. 1990) (holding that claims arising out of the failure to shoot down Iraqi fighters that attacked the U.S.S. Stark were nonjusticiable), aff'd, 935 F.2d 544 (2d Cir. 1991). Plainly, courts should not second-guess the military in this area, by employing tort law principles to determine whether servicemen engaged in the Nation's defense acted in accordance with a court's conception of the "prudent intercept" (Pet. App. A14).

Contrary to petitioner's contention (Pet. 9-10), this Court has never suggested that a suit is justiciable unless it challenges "military policy and planning" or

involves an injured serviceman.[3] Consequently, the lower courts have consistently declined to adjudicate those few cases, involving injuries to civilians, in which military operations have been called into question. *Nejad* v. *United States*, 724 F. Supp. 753, 755 (C.D. Cal. 1989) (dismissing claims arising from the downing of an Iranian airliner by the U.S.S. Vincennes); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 597 F. Supp. 613, 616 (D.D.C. 1984) (refusing to adjudicate allegations that the military deployed military aircraft in a manner that increased the risk that the Soviet Union would misidentify Flight KAL 007); *Rappenecker* v. *United States*, 509 F. Supp. 1024 (N.D. Cal. 1980) (dismissing as nonjusticiable claims based on the Cambodian seizure of the S.S. Mayaguez and the United States' military response to that seizure).[4] *Rappenecker* and *Nejad* specifically rejected the notion that the political question doctrine is limited to matters of policy, as opposed to military operations.[5]

[3] The Court has not had occasion to consider a case with facts similar to those of this case. Such cases have been very rare, and this Court's review is ordinarily reserved for cases presenting questions of recurrent importance. There is no merit to petitioner's attempt (see Pet. 9-10) to derive from the facts of the cases this Court has decided a rule that the political question doctrine is limited to issues of "military policy and planning."

[4] These cases were not, as petitioner suggests (Pet. 10 n.9), limited to challenges to military policy. *Rappenecker* did hold that the allegedly negligent failure of the government to issue warnings to merchant ships regarding possible actions by the Cambodian government was actionable. See 509 F. Supp. at 1030. That claim, however, did not involve any review of military operations.

[5] In *Nejad*, the court explained:

3. There is no conflict between the court of appeals' decision and the decisions of any other court of appeals. With one exception, all of the cases on which petitioner relies (Pet. 14-16) involved training missions. See *Peterson* v. *United States*, 673 F.2d 237, 240 (8th Cir. 1982); *Ward* v. *United States*, 471 F.2d 667, 670 (3d Cir. 1973); *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379, 393-394 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964).[6] The court of appeals in this case expressly distinguished those cases, explaining that "[w]hen conducting training exercises, * * * national defense interests may be more

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> Plaintiffs contend that they do not call into question the President's decision to send U.S. warships to the Persian Gulf, but only the negligent manner in which the President's decision was carried out. This contention too must fail.
>
> > [T]he same considerations which preclude judicial examination of the decision to act must necessarily bar examination of the manner in which that decision was executed by the President's subordinates. The textual commitment to the President as commander in chief of authority for military decisions entails that his decision may be implemented without judicial scrutiny. Moreover, courts lack standards with which to judge whether reasonable care was taken to achieve tactical objectives in combat while minimizing injury and loss of life.
>
> 724 F. Supp. at 755 (quoting *Rappenecker*, 509 F. Supp. at 1030).

[6] The one exception, *Downs* v. *United States*, 522 F.2d 990, 995-997 (6th Cir. 1975), is even farther afield. In that case, the court held that allegedly negligent actions by FBI agents responding to an aircraft hijacking were not within the discretionary function exception. The court did not address the issue of justiciability. Moreover, it relied heavily on the tradition of judicial scrutiny of "the day-to-day activities of law enforcement officers," *id.* at 997-998, a consideration totally absent from the instant case.

remote and the military faces different restrictions." Pet. App. A16. Furthermore, the decisions on which petitioner relies addressed only the availability of the discretionary function exception.[7] There is no reason to believe that the courts that issued them would hold, contrary to the court of appeals here, that claims arising out of "actions taken in actual military defense of our country" (Pet. App. A11) are justiciable.

4. Nor does the court of appeals' decision conflict with this Court's decision in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988). See Pet. 7-8. The only issue in *Boyle* was the extent to which federal interests preempted the application of state products liability law to equipment purchased from defense contractors. In resolving that question, the Court refused to define the area of preemption by reference to the *Feres* doctrine,[8] choosing instead to incorporate the boundaries of the discretionary function exception. The Court did not "reject[] the separation of powers doctrine as a foundation for analysis of torts involving civilians" (Pet. 8). In fact, the Court's decision not to follow *Feres* was based in part on the fact that that approach would be too narrow as applied to civilian injuries. 487 U.S. at 510-511.

In any event, *Boyle* did not address the question presented by this case, which is the extent of the

---

[7] To the extent that those decisions draw a strict distinction between policy and operations, they have been overruled by *United States* v. *Gaubert*, 111 S. Ct. 1267, 1275 (1991). In *Gaubert*, this Court rejected the proposition that the discretionary function exception "refers exclusively to the policy-making or planning functions" and refused to recognize the "nonexistent dichotomy between discretionary functions and operational activities."

[8] See *Feres* v. *United States*, 340 U.S. 135 (1950).

judiciary's authority to adjudicate cases involving military matters. While *Feres*, the discretionary function exception, and the political question doctrine have similar roots, they are legally distinct.

5. As petitioner acknowledges (*e.g.*, Pet. 7), the court of appeals did not hold that the discretionary function exception dictated a judgment in the government's favor. The court made clear that although the discretionary function exception "inform[ed]" its inquiry, its decision rested on different grounds. Pet. App. A11. Consequently, there is no merit to petitioner's contention (Pet. 11-14) that further review is warranted to clarify the application of the discretionary function exception.

Moreover, petitioner's reliance on *Berkovitz* v. *United States*, 486 U.S. 531 (1988), embodies a fundamental misconception regarding the role that a statute or regulation may play in a tort action against the United States. *Berkovitz* held that the government may not invoke the discretionary function exception "when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id.* at 536. In holding that this FTCA exception is unavailable, however, the Court did not adopt the more radical proposition advanced by petitioner here—that the United States is *liable* for any violation of a regulation. See Pet. 13 (suggesting that court of appeals' refusal to accept petitioner's "assumption that NORAD regulations automatically create an actionable duty in tort toward civilians" was "in direct contravention of this Court's holdings in *Gaubert* and *Berkovitz*").

The court of appeals correctly understood, therefore, that the existence of written procedures for intercepts of unknown aircraft would not alleviate the difficulties inherent in judicial review of this case. A

court intrudes on military judgments when it determines which, if any, military directives give rise to tort duties in favor of potential plaintiffs or applies the general standard of due care in an area in which there are such regulations. Further, as the court of appeals recognized, some of the regulations on which petitioner has relied preserve substantial areas of judgment for those called upon to act on them. Pet. App. A19-A20.

Petitioner's reliance on the FTCA exception for "combatant activities * * * during time of war" (28 U.S.C. 2680(j)) is also misplaced. The court of appeals did not suggest that the Federal Tort Claims Act forecloses petitioner's action; therefore, the fact that the exception for combatant activities would not encompass petitioner's claims, a point going to the proper interpretation of that statute, is irrelevant here. The fact that Congress saw fit expressly to exclude claims involving combatant activities from the FTCA's waiver of sovereign immunity simply does not suggest that it considered all other claims involving the military to be justiciable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991 — 312-323/45162

Supreme Court, U.S.
FILED
JAN 6 1992
OFFICE OF THE CLERK

(3)

NO. 91-510

Supreme Court of the United States

October Term, 1991

Patsy O. Tiffany
Administratrix and Personal Representative
For the Estate of Henry H. Tiffany, Deceased,
Petitioner,

v.

United States of America
Respondent,

v.

Brandon Ladd Corporation
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks to review a decision of the Court of Appeals for the Fourth Circuit which holds that separation of powers principles bar redress against the Government for violations of Air Force regulations and procedures that caused a midair collision with a civilian aircraft in peacetime. The court of appeals' decision raises important constitutional issues defining the scope of the separation of powers doctrine, principles of justiciability, and the limits of the Government's waiver of sovereign immunity under the Suits in Admiralty Act and the Federal Tort Claims Act. In our petition, we showed that the court of appeals departed from the established procedure of analyzing Governmental negligence in terms of discretion, and thus was in conflict with decisions of this Court and decisions of the Third, Eighth, and Ninth Circuits. In

addition, we showed that the Governmental immunity created by the court of appeals would displace the combatant activities exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(j), in its entirety, rendering the exception meaningless.

The United States' brief in opposition does not dispute that the court of appeals avoided discretionary function analysis as the grounds for its decision. Nor does it deny that the scope of military immunity created by the court of appeals exceeds the scope of immunities that are available by reason of discretionary function or under the combatant activities exception of the FTCA. However, the Government belittles the significance of the circuit court's departure from established precedent. The Government asserts that "petitioner repeatedly overstates the scope of the court of appeals' holding" (Opp. at 7), that the court of appeals' decision was "consistent with decisions of this Court and of other courts of appeals" (*Id.*), and that further review is unnecessary because "the court's holding was limited to the unusual facts of this case" (Opp. at 8). We reply briefly to these assertions here.

1. The Court of Appeals' Holding Was Not Premised on any Unique or Unusual Circumstances.

The Government portrays the intercept in suit as a "quintessentially military mission" (Opp. at 7) involving "actions taken in actual military defense of our country" (Opp. at 8, quoting Ct. of App. Op., Pet. App. at A-11). The importance of the mission purportedly invokes special constitutional considerations. The Government argues that the intercept "is not properly subject to judicial review," (Opp. at 7), because "the judiciary should be particularly reluctant to review the propriety of military operations" (Opp. at 8). Paradoxically, the Government also suggests that the case should be of little concern to this Court because the gravity of the intercept mission sets it apart from routine military activities and diminishes its value as precedent. The Government argues that this case "involves a highly unusual tort claim," (Opp. at 7), and that the holding was "limited to the unusual facts of this case, the adjudication of which

involves an exceptional intrusion into military matters'' (Opp. at 8).[1]

Neither the facts in the record nor the scenario proffered by the court of appeals justifies these assumptions. As we noted in our petition, there was no evidence that a combat situation was ever anticipated or expected. (Pet. at 5, n. 6.) Indeed, the regulations promulgated to the civilian pilots emphasized that peacetime identification intercepts were ''vastly different than those conducted under increased states of readiness.'' *Id.* Moreover, the very existence of regulations requiring 1000 feet of vertical separation and a limited overtake speed during intercepts suggests that the discretion of the pilots was purposefully limited in order to prevent them from confusing the high level of prudence required in a peacetime intercept situation with the greater risks appropriate to a combat situation.

Furthermore, although the court of appeals made frequent reference to the military importance of the intercept, its holding was in no way limited to the ''unusual facts'' that the Government now perceives. On the contrary, the court expressly declared that ''The elementary canons of judicial caution are not limited to actions taken during actual wartime, but *may extend to many other aspects of military operations.*'' (Pet. App. at A-13, emphasis added.) Indeed, the court of appeals only grudgingly tried to distinguish contrary precedent by observing that national defense interests ''may be more remote'' when the military is conducting training exercises or acting in the civilian arena. (Pet. App. at A-16.)

The danger of the court of appeals' reasoning is that, contrary to the Government's assertion, there is no logical way to distinguish the circumstances of Henry Tiffany's death from

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1. In promoting the military importance of the intercept mission, the Government more than once attributes fault to Tiffany that is inconsistent with the district court's findings of fact. Thus, the Government asserts that Henry Tiffany ''unlawfully entered the Air Defense Identification Zone'' (Opp. at 2) and asserts that Tiffany invited the collision by ''knowingly failing to give the notice (filing a flight plan) that would have made clear his civilian status'' (Opp. at 9). But the district court expressly declined to find that Tiffany's failure to follow the flight plan was deliberate or that he was trying to evade detection. (Pet. App. at B-2).

those of countless other situations in which civilians are injured or killed as a consequence of military negligence. The purpose of the military is to provide for the national defense. It follows that almost all military operations serve national defense purposes, directly or indirectly. If the negligent violation of the Air Force's own safety regulations in the course of a peacetime identification of a civilian aircraft is constitutionally protected, there is no sound reason why other noncombatant military operations, including training missions or the operation of motor vehicles, should not be similarly protected.[2] Thus the conflict with the contrary decisions of three other circuits is real. Moreover, the court of appeals' failure to define the limits of protected military activities with any precision invites other courts to disrupt the law in this area further.

The alleged uniqueness of this situation is the keystone that holds together the other arguments in opposition to the petition. On examination, it is clear that these arguments must fail. The rationale of the court of appeals' decision is not that strange facts require strange law. The court of appeals simply declined to follow established law.

2. The Court of Appeals' Decision Is a Radical Departure From Prior Law.

In our Petition for Certiorari, we showed that the court of appeals' decision departs from prior law in three major respects. First, it extends the doctrine of nonjusticiability

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2. The circumstances here illustrate the difficulties of drawing any distinction between military operations that are nonjusticiable and those in which the military may be subject to suit. The interceptor that struck the Tiffany aircraft was not operated by career Air Force personnel, but rather by members of the Michigan Air National Guard who were assigned to NORAD for temporary duty. Clearly, one purpose of the assignment was to keep the pilots trained.

The line between the civilian arena and the military arena is similarly vague. At the time of the collision Henry Tiffany was flying in a location where civilian aircraft were permitted and had been communicating his intentions to air traffic control for nearly fifteen minutes. Yet the court of appeals obviously did not consider the collision to be an intrusion into the civilian arena.

beyond the policy sphere to embrace peacetime operational negligence against civilians in violation of regulations and procedures intended to protect civilian safety. (Pet. at 7-11.) Second, it abandons the well-defined discretionary function test as the measure of the Government's waiver of sovereign immunity in favor of a vague "separation of powers" analysis whose boundaries are wholly uncharted.[3] Third, it creates an exception for military liability that renders the "combatant activities" exception of the FTCA meaningless. (Pet. at 16-18.)

The Government takes serious issue only with the first of these contentions. The Government characterizes the court of appeals' decision as "well founded" in light of the limited precedents that the court of appeals cited to support its conclusion that the courts could not "assess the propriety of military operations." (Opp. at 8.) This observation is irrelevant because the "propriety" of the intercept was expressly not challenged. Petitioner did not question the decision to conduct the intercept. (Pet. at 4.) Instead, the negligence found by the district court involved the violation of regulations and established standards of care in the execution of the intercept, conceded by the Government's own expert. (Pet. at 5, n. 7.)

More significantly, the Government contends that the distinction between challenges to policy decisions and challenges to operational decisions is unimportant because courts have "specifically rejected the notion that the political question doctrine is limited to matters of policy as opposed to military operations." (Opp. at 11.) This position is unfounded. The two district court cases the Government cites involve combat situations where standards to govern the military's conduct were wholly lacking. Indeed, the underlying

3. The classic formulation of the separation of powers doctrine in *Baker v. Carr*, 369 U.S. 186, 217 (1962), quoted by the court of appeals at Pet. App. A-9, concerned a decision involving reapportionment in state legislatures. As we noted in our petition for certiorari, decisions of this Court that have discussed the doctrine have limited its application to circumstances involving challenges to military policy or planning, or intra-service matters involving servicemen's claims against the military or derivative claims. (Pet. at 9-10.)

principle quoted by the Government was that "courts lack standards with which to judge whether reasonable care was taken to achieve tactical objectives in combat while minimizing injury and loss of life." *Nejad v. United States*, 724 F. Supp. 753, 755 (C.D. Cal. 1989), *quoting Rappenecker v. United States*, 509 F. Supp. 1024, 1030 (N.D. Cal. 1980).[4] In this case, by contrast, there were clear standards governing the conduct of the intercept. Furthermore, those standards were published to civilian pilots to enhance the safety of the intercept.[5]

The Government agrees that the court of appeals' decision is not premised on the application of the discretionary function exception, but rather that it "rested on different grounds." (Opp. at 14.) Indeed, the Government contends that the standards applied in *Berkovitz v. United States*, 486 U.S. 531 (1988) have no bearing here, because courts do not have the power to determine "which, if any, military directives give rise to tort duties in favor of potential plaintiffs." (Opp. at 15.)

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4. Because they involved combat situations, both *Nejad* and *Rappenecker* would have been subject to the exception of the FTCA for "combatant activities," 28 U.S.C. § 2680(j), to the extent that this exception is incorporated by implication into the Suits in Admiralty Act. Neither district court addressed this issue.

The Government also suggests that *In re Korean Air Lines Disaster of Sept. 1, 1983*, 597 F. Supp. 613, 616 (D.D.C. 1984), stands for the proposition that courts "have consistently declined to adjudicate those few cases, involving injuries to civilians, in which military operations have been called into question." (Opp. at 11). The suggestion is in error. The court in *Korean Air Lines* made reference to separation of powers principles in its determination that "the executive decision to conduct reconnaissance activity" and the "method and manner *of that decision*" were not subject to judicial review. *Id.* at 617 (emphasis added). But the court did not dismiss the plaintiffs' claims that "the existence of operational procedures governing the monitoring and warning of civilian aircraft" were potentially actionable. Instead, the court analyzed these claims in light of the discretionary function exception of the FTCA and concluded that further discovery was necessary before the claims could be resolved. *Id.* at 618. The claims were later dismissed for lack of evidence that "the government's incompetence worsened the position of the aircraft," and because the Soviet decision to shoot down the aircraft constituted a superseding cause of the accident. *In Re Korean Air Lines Disaster of Sept. 1, 1983*, 646 F. Supp. 30, 35 (D.D.C. 1986).

5. See Pet. at 5, n. 6.

The Government's position underscores the danger of the court of appeals' decision, which reverses nearly half a century of precedent. As we pointed out in our petition, this Court rejected the view that the "separation of powers" doctrine should apply to regulations governing government contractors in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), adopting, instead, the "federal policy" that these claims should be analyzed in light of the discretionary function exception of the FTCA. (Pet. at 7-9.) In *Berkovitz*, this Court held that the discretionary function exception of the FTCA did not bar claims for violation of Government regulations that allowed no exercise of policy discretion. In *Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955) and *Rayonier, Inc. v. United States*, 352 U.S. 315, 318-19 (1957), this Court expressly rejected the argument that the Government was not immune from suit for its performance of "uniquely governmental functions." The Government now proposes that these decisions have no relevance to suits against the military involving activities touching national defense.

Finally, the radical nature of the Government's position is augmented by the Government's acknowledgment that the court of appeals' decision would vitiate the significance of the combatant activities exception of the FTCA, 28 U.S.C. § 2680(j).[6] The Government proffers no explanation to justify the narrow limitation of the combatant activities exception. Instead, it proposes that "The fact that Congress saw fit expressly to exclude claims involving combatant activities from the FTCA's waiver of sovereign immunity simply does not suggest that it considered all other claims involving the military to be justiciable." In short, the Government argues that the language chosen by Congress did not reflect the extent of the Government's waiver of sovereign immunity under the FTCA.

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6. The Government asserts that the application of the combatant activities exception is "irrelevant" because "the court of appeals did not suggest that the Federal Tort Claims Act forecloses petitioner's action." (Opp. at 15.) This assertion is misleading. Although the present action was brought under the Suits in Admiralty Act, 46 U.S.C. §§ 741-52, most tort suits against the military arise under the FTCA. The proper interpretation of the FTCA is therefore highly relevant.

It is clear that the Fourth Circuit's decision disrupts settled federal law involving important statutory and constitutional issues. This Court's intervention is needed to restore uniformity to the law and to carry out the intent of Congress.

Conclusion

For the foregoing reasons, the petition for certiorari should be granted.

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